Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

PETITION FOR CERTIORARI FILED MAY 20, 1974
CERTIORARI GRANTED NOVEMBER 18, 1974

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In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN PROCEEDINGS BELOW

January 18, 1971—Original bill of complaint for recovery of taxes, penalty and interest improperly and erroneously paid.

May 12, 1971—General demurrer filed by the defendant.

May 26, 1971—Motion for leave to file an amended complaint for recovery of taxes, penalty and interest improperly and erroneously paid.

May 26, 1971—Order granting leave to file an amended bill of complaint for recovery of taxes, penalty and interest improperly and erroneously paid.

May 26, 1971—Amended bill of complaint for recovery of taxes, penalty and interest improperly and erroneously paid.

August 5, 1971—General demurrer filed by the defendant.

September 28, 1971—Decree overruling general demurrer filed.

November 18, 1971—Answer and cross bill filed by the defendant and cross-complainant.

January 13, 1972—Answer to the cross bill filed by complainant and cross-defendant.

January 20, 1972—Stipulation filed.

January 21, 1972—Trial in the Chancery Court of the First Judicial District of Hinds County, Mississippi commenced.

July 14, 1972—Opinion of the Chancery Court filed.

July 28, 1972—Final decree and judgment of the Chancery Court filed.

August 1, 1972—Notice to court reporter to transcribe notes and appellant's designation of record filed.

October 20, 1972—Appeal bond filed.

December 19, 1972—Record forwarded to the Supreme Court of Mississippi.

December 29, 1972—Record and bond filed in the Supreme Court of Mississippi.

January 28, 1974—Opinion of the Supreme Court of Mississippi.

February 18, 1974—Petition for rehearing denied by the Supreme Court of Mississippi.

April 25, 1974—Mandate issued by the Supreme Court of Mississippi.

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 81,953

W. M. GURLEY, d/b/a GURLEY OIL COMPANY
Complainant

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF
STATE TAX COMMISSION FOR THE STATE
OF MISSISSIPPI
Defendant

ORIGINAL BILL OF COMPLAINT FOR RECOVERY OF TAXES, PENALTY AND INTEREST IMPROPERLY AND ERRONEOUSLY PAID

(Filed January 18, 1971)

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI:

Complainant, W. M. Gurley, d/b/a Gurley Oil Company, respectfully states unto the Court that:

I.

Complainant is a sole proprietorship, with its office and principal place of business located in West Memphis, Arkansas, and it is authorized to do business in the State of Mississippi.

II.

That Defendant above named has been duly appointed to, and now holds and enjoys, the office of Chairman of the State Tax Commission for the State of Mississippi, with office and principal place of business in Jackson, Mississippi.

III.

This suit is brought pursuant to, and jurisdiction of this Court is conferred by, Section 10121, *Mississippi Code Annotated*, 1942.

IV.

Sections 10013-01, *et seq.*, *Mississippi Code Annotated*, 1942 (effective September 1, 1966, until January 1, 1970), imposed on excise tax on persons engaged in the business of selling gasoline. In particular, Section 10013-06, *Mississippi Code Annotated*, 1942, provided:

> "Any person engaged in business *as a distributor*, or *who acts as a distributor*, as defined in this act, *shall pay for the privilege of engaging in such business*, or acting as such distributor, *an excise tax* equal to and computed as follows:
>
> "(A) Seven cents (7¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose.
>
> "(B) Ten cents (10¢) per gallon on all diesel fuel and kerosene stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose. * * *
>
> "(C) One-half cent (1/2¢) per gallon on all oils, as defined in this act, stored, sold, or distributed or received in this state for sale, storage, distribution, or use * * * provided, that if any distributor or other person shall sell any oil knowing or having good reason to know that the same is to be used or compounded, mixed, or blended for motor vehicle purposes, or for use in propelling motor vehicles, machines, or machinery of any type on the highways, as defined in this act, said distributor or other person selling same shall be liable for eight cents (8¢) per gallon tax on said oil. * * *
>
> "* * * The *tax herein imposed and assessed shall be collected and paid to the State of Mississippi* but once in respect to any gasoline, diesel fuel, kerosene, or oil, and the basis for determining the tax liability shall be the correct invoiced gallons, adjusted to 60° F., at the refinery or point of origin of shipment when such shipment is made by tank car or by motor carrier."

This Section concluded with the following language:

> "Provided that *the tax levied by this section may be passed on to the ultimate consumer* and such consumer in ascertaining his net income for the income tax purposes may deduct any such taxes he has actually paid, upon proof satisfactory to the Income Tax Commissioner, during the year from his gross income, provided the total deduction shall not exceed in any one (1) year ten per cent (10%) of the person's net income, and such tax shall be collected in the same manner as heretofore."

Section 10013-02, *Mississippi Code Annotated*, 1942, defined the term "distributor" for purposes herein as follows:

> "(g) The term 'distributor' as used in this act shall include (1) every person who shall sell or distribute gasoline, diesel fuel, kerosene, or oil for resale, and (2) every person importing, receiving, purchasing, acquiring, using, storing, or selling any gasoline, diesel

fuel, kerosene or oil in this State on which the fuel excise tax hereinafter imposed by this act has not been paid, or the payment of which is not covered by the bond of a qualified Mississippi distributor; provided that no person may qualify as a distributor for the purpose of using oil, as defined in this act, as a fuel to propel a vehicle or vehicles owned by him on the highways of this State.

"The term 'distributor' as used in this act shall also include every person who distributes motor fuel other than gasoline, diesel fuel or kerosene through a regular pump, and such person shall be required to apply for a permit before distributing same, and no distributor of gasoline, diesel fuel, kerosene, or oil shall deliver any motor fuel other than gasoline, diesel fuel or kerosene into a regular retail service station tank to which a service pump is connected unless and until said permit has been issued."

V.

Section 10015-01, *et seq.*, *Mississippi Code Annotated*, 1942 (effective September 1, 1966, until January 1, 1970) provided for the taxation of the sales of lubricating oil within the State of Mississippi. In particular, Section 10015-05, *Mississippi Code Annotated*, 1942, provided:

"Any person engaged in the business *as a distributor*, or *who acts as a distributor* as defined in this act, *shall pay for the privilege of engaging in such business* or acting as such distributor, an *excise tax* equal to and computed as follows:

"Two cents (2¢) per quart, (8¢ per gallon) on all lubricating oil stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, storage, distribution

or for use in the crank case of any internal combustion engine.

"Provided that *the tax herein imposed and assessed shall be collected and paid to the State of Mississippi* but once in respect to any lubricating oil, and the basis of determining the tax liability shall be the correct invoiced gallons at the refinery or the point of origin of shipment when such shipment is made by tank car or motor carrier."

For purposes of this article, Section 10015-02, *Mississippi Code Annotated*, 1942, defined the term "distributor" as follows:

"The term 'distributor' as used in this act shall include (1) Every person who shall sell or distribute lubricating oil for resale, (2) Every person importing, receiving, purchasing, acquiring, using, storing or selling any lubricating oil in this state on which the privilege excise tax hereinafter imposed by this act has not been paid, or the payment of which is not covered by the bond of a qualified Mississippi distributor."

VI.

Section 4081 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. §4081) provides:

"(a) There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ per gallon."

Section 4091 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. §4091) provides:

"There is hereby imposed on lubricating oil (other than cutting oils) which is sold in the United States by the manufacturer or producer a tax of 6 cents a gallon, to be paid by the manufacturer or producer."

VII.

Section 10104 *et seq.*, *Mississippi Code Annotated*, 1942, provides generally for the taxation on the sale at retail or resale of tangible personal property in the State of Mississippi computed on the basis of gross proceeds of retail sales. In particular, Section 10108, *Mississippi Code Annotated*, 1942, provides that:

> "Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed, and shall be collected a tax equal to five per cent (5%) of the gross proceeds of the retail sales of the business, except as otherwise provided herein."
>
> "* * * Wholesale sales, as defined in §10104-01, *Mississippi Code Annotated*, 1942, Recompiled, as Amended, shall be taxed at a rate of one eighth of one per cent (1/8 of 1%) of the gross proceeds of sales, except as otherwise provided." "* * * Wholesale sales of beer, motor fuel, soft drinks, and syrup shall be taxed at the rate of five per cent (5%) in lieu of the one eighth of one per cent (1/8 of 1%) wholesale tax, and the retailers shall file a return and compute the retail tax on retail sales, but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property, provided adequate invoices and records are maintained to substantiate the credit."

Section 10104, *Mississippi Code Annotated*, 1942, defines the phrase "gross proceeds of sales", as used in this act, as follows:

> "(7) 'Gross proceeds of sales' means the value proceeding or accruing from the full *sale price* of tangible personal property, including installation charges, carrying charges, or any other addition to the selling price on account of deferred payments by the purchaser, without any deduction for freight, cost of property sold, or other expenses or losses, or taxes of any kind except those expressly exempt by §10116, Mississippi Code of 1942, Recompiled, as Amended."

VIII.

During the period September 1, 1965, through January 21, 1969, Complainant sold gasoline and lubricating oil within the State of Mississippi on which he collected and disbursed both Federal and State excise taxes as required by law.

Subsequent to audit, Complainant was assessed for this period an additional sales tax in the amount of $18,556.41. This additional sales tax liability was based upon Defendant's determination that both the Federal and State excise taxes constitute a valid part of "gross proceeds of sale". Complainant charges and complains that the Defendant's inclusion of the Federal and State excise taxes in his gross proceeds of sale was improper, erroneous and contrary to law, and neither of these taxes constitute a valid part of "gross proceeds of sale".

X.

Complainant has heretofore made full payment of the additional sales tax assessment. Complainant alleges that he alone bore the burden of the taxes herein sued for and did not directly or indirectly collect the taxes from his customers. Complainant alleges further that he has applied to the State Tax Commission by Petition in writing for hearing and correction of the amount of tax assessed upon him by Commissioner, which Petition was denied by Commission.

XI.

That Defendant has refused and continues to refuse to pay over to Complainant said amount of additional sales tax assessment, to-wit, $18,556.41, or to allow Complainant credit therefor.

XII.

Defendant's refusal to pay over to Complainant said amount or to allow credit therefor is arbitrary, capricious, and contrary to the statutes above cited.

WHEREFORE, Complainant prays that:

1. Process issue and be served on Defendant requiring him to answer this Bill of Complaint in full but oath to his answer is hereby waived.

2. Defendant pay over to Complainant the sum of $18,556.41, together with interest thereon at the highest legal rates from the date of payment or such other sum to which Complainant may be entitled or to allow Complainant credit therefor together with attorney's fees in an amount set by this Court.

3. Complainant have such other and further relief, both general and special, to which this Court may find Complainant entitled.

/s/ W. M. Gurley
Complainant

(Verification Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY,
MISSISSIPPI

(Title Omitted in Printing)

GENERAL DEMURRER

(Filed May 12, 1971)

Comes now Arny Rhoden, Chairman of the State Tax Commission of Mississippi, ddfendant by his attorneys, and demurs generally to the bill of complaint filed against him in this cause upon the following grounds, to-wit:

(1) There is no equity upon the face of said bill of complaint.

(2) For such other reasons as will be shown upon the hearing hereof.

Arny Rhoden, Chairman, State Tax Commission of Mississippi, Defendant

By: /s/ Taylor Carlisle
P. O. Box 960, Jackson, MS.

/s/ Wm. G. Burgin, Jr.
P. O. Box 32,
Columbus, MS.
His Attorneys

(Certificate Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT FOR RECOVERY OF TAXES, PENALTY AND INTEREST IMPROPERLY AND ERRONEOUSLY PAID

(Filed May 26, 1971)

Comes now the Complainant, W. M. Gurley, d/b/a Gurley Oil Company, and moves this Court for leave to file an Amended Bill of Complaint for Recovery of Taxes, Penalty and Interest Improperly and Erroneously Paid and as grounds for the granting of said Motion would show unto the Court the following:

1. That the Complainant was assessed additional sales taxes for a period subsequent to the period covered in the original Bill of Complaint filed in this cause and that such taxes were erroneously, improperly and unlawfully collected from Complainant for the same reasons as set forth in the original Bill of Complaint for the period covered thereby.

2. That during the same period covered by the additional assessments Complainant was improperly charged with sales taxes which were erroneous and contrary to law and which were improperly collected by Defendant on account of the erroneous determination of the sales price of the said gasoline and lubricating oil sold by Complainant during this period which taxes were paid by Complainant under protest by remittances filed with his regular returns.

3. That Complainant should be allowed to file its Amended Bill of Complaint in order for Complainant to obtain full relief to which he is entitled and in order that all issues may be fully litigated in this action.

4. That Complainant should be allowed to file his Amended Bill of Complaint in order to more properly and fairly bring the issues of this cause to trial.

5. That the Amended Bill of Complaint is not filed for the purpose of delay and that the filing of same will not in any manner prejudice the Defendant.

Respectfully submitted,

W. M. Gurley, d/b/a Gurley Oil Company

By: /s/ Charles R. Davis
One of the Attorneys for Complainant

Thomas, Price, Alston, Jones & Davis
50 First National Bank Buolding
Post Office Drawer 1532
Jackson, Mississippi 39205

Armstrong Allen Braden Goodman
McBride & Prewitt
15th Floor Commerce Title Building
Memphis, Tennessee 38103
Of Counsel

Filed
May 26 1971
Tom Virden
Chancery Clerk
By /s/ Ruth May D. C.

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

ORDER GRANTING LEAVE TO FILE AMENDED BILL OF COMPLAINT FOR RECOVERY OF TAXES, PENALTY AND INTEREST IMPROPERLY AND ERROENOUSLY PAID

(Filed May 26, 1971)

This cause came on to be heard on Complainant's Motion for Leave to File Amended Bill of Complaint for Recovery of Taxes, Penalty and Interest Improperly and Erroneously Paid, and it appearing that justice requires such leave to be given, and the Court being fully advised, it is

ORDERED, ADJUDGED AND DECREED, that the Complainant, W. M. Gurley, d/b/a Gurley Oil Company, be, and he is hereby, allowed and permitted to file his Amended Bill of Complaint for Recovery of Taxes, Penalty and Interest Improperly and Erroneously Paid.

ORDERED, ADJUDGED AND DECREED, this the 26th day of May, 1971.

/s/ J. C. Stennett
Chancellor

Filed
May 26 1971
Tom Virden
Chancery Clerk
By /s/ Ruth May D. C.

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

AMENDED BILL OF COMPLAINT FOR RECOVERY OF TAXES, PENALTY AND INTEREST IMPROPERLY AND ERRONEOUSLY PAID

(Filed May 26, 1971)

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI:

Complainant W. M. Gurley, d/b/a Gurley Oil Company, respectfully states unto the Court that:

I.

Complainant is a sole proprietorship, with its office and principal place of business located in West Memphis, Arkansas, and it is authorized to do business in the State of Mississippi.

II.

That Defendant above named has been duly appointed to, and now holds and enjoys, the office of Chairman of the State Tax Commission for the State of Mississippi, with office and principal place of business in Jackson, Missisippi.

III.

This suit is brought pursuant to, and jurisdiction of this Court is conferred by Section 10121, *Mississippi Code Annotated*, 1942.

IV.

Sections 10013-01, *et seq.*, *Mississippi Code Annotated*, 1942 (effective September 1, 1966, until January 1, 1970),

imposed an excise tax on persons engaged in the business of selling gasoline. In particular, Section 10013-06, *Mississippi Code Annotated,* 1942, provided:

> "Any person engaged in business *as a distributor,* or *who acts as a distributor,* as defined by this act, *shall pay for the privilege of engaging in such business,* or acting as such distributor, *an excise tax* equal to and computed as follows:
>
> "(A) Seven cents (7¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose.
>
> "(B) Ten cents (10¢) per gallon on all diesel fuel and kerosene stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose. * * *
>
> "(C) One-half cent (1/2¢) per gallon on all oils, as defined in this act, stored, sold or distributed or received in this state for sale, storage, distribution, or use * * * provided, that if any distributor or other person shall sell any oil knowing or having good reason to know that the same is to be used or compounded, mixed, or blended for motor vehicle purposes, or for use in propelling motor vehicles, machines, or machinery of any type on the highways, as defined in this act, said distributor or other person selling same shall be liable for eight cents (8¢) per gallon tax on said oil. * * *
>
> "* * * The *tax herein imposed and assessed shall be collected and paid to the State of Mississippi* but once in respect to any gasoline, diesel fuel, kerosene, or oil, and the basis for determining the tax liability shall be the correct invoiced gallons, adjusted to 60° F., at the refinery or point of origin of shipment when such shipment is made by tank car or by motor carrier."

This section concluded with the following language:

> "Provided that *the tax levied by this section may be passed on to the ultimate consumer* and such consumer in ascertaining his net income for the income tax purpose may deduct any such taxes he has actually paid, upon proof satisfactory to the Income Tax Commissioner, during the year, from his gross income provided the total deduction shall not exceed in any one (1) year ten per cent (10%) of the person's net income, and such tax shall be collected in the same manner as heretofore."

Section 10076-01, *et seq., Mississipi Code Annotated,* 1942 (effective January 1, 1970) imposes an excise tax on persons engaged in the business of selling gasoline. In particular, Section 10076-05, *Mississippi Code Annotated,* 1942, provides:

> "Any person in business *as a distributor of* gasoline, or who acts as a distributor of gasoline, as defined in this act, *shall pay for the privilege of engaging in such business* or acting as such distributor *an excise tax* equal to Eight Cents (8¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose. . . .
>
> "Provided that *the tax herein imposed and assessed shall be collected and paid to the State of Mississippi*

but once in respect to any gasoline, and the basis for determining the tax liability shall be the correct invoiced gallons, adjusted to 60 degrees F., at the refinery or point of origin of shipment when such shipment is made by tank car or by motor carrier."

Section 10013-02, *Mississippi Code Annotated*, 1942, defined the term "distributor" for purposes herein as follows:

"(g) The term 'distributor' as used in this act shall include (1) every person who shall sell or distribute gasoline, diesel fuel, kerosene, or oil for resale, and (2) every person importing, receiving, purchasing, acquiring, using, storing, or selling any gasoline, diesel fuel, kerosene or oil in this State on which the fuel excise tax hereinafter imposed by this act has not been paid, or the payment of which is not covered by the bond of a qualified Mississippi distributor; provided that no person may qualify as a distributor for the purpose of using oil, as defined in this act, as a fuel to propel a vehicle or vehicles owned by him on the highways of this State.

"The term 'distributor' as used in this act shall also include every person who distributes motor fuel other than gasoline, diesel fuel or kerosene through a regular pump, and such person shall be required to apply for a permit before distributing same, and no distributor of gasoline, diesel fuel, kerosene, or oil shall deliver any motor fuel other than gasoline, diesel fuel or kerosene into a regular retail service station tank to which a service pump is connected unless and until said permit has been issued."

Section 10076-02, *Mississippi Code Annotated*, 1942, defines the term "distributor" for purposes herein as follows:

"(c) 'Distributor of gasoline' shall mean: (1) any person who shall sell or distribute gasoline for resale or use, or (2) any person importing, receiving, purchasing, acquiring, using, storing, or selling any gasoline in this State on which the gasoline excise tax hereinafter imposed by this act has not been paid or the payment of which is not covered by the bond of a qualified Mississippi distributor of gasoline. All refiners, processors, marine terminal operators, or pipeline terminal operators shall qualify as distributors of gasoline as provided in this act.

V.

Section 10015-01, *et seq., Mississippi Code Annotated,* 1942 (effective September 1, 1966, until January 1, 1970) imposed an excise tax on persons engaged in business as a distributor of lubricating oil within the State of Mississippi. In particular, Section 10015-05, *Mississippi Code Annotated,* 1942, provided:

"Any person engaged in the business *as a distributor,* or *who acts as a distributor* as defined in this act, *shall pay for the privilege of engaging in such business* or acting as such distributor, an *excise tax* equal to and computed as follows:

"Two cents (2¢) per quart, (8¢ per gallon) on all lubricating oil stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, storage, distribution or for use in the crank case of any internal combustion engine.

"Provided that the tax herein imposed and assessed shall be collected and paid to the State of Mississippi but once in respect to any lubricating oil, and the basis of determining the tax liability shall be the cor-

rect invoiced gallons at the refinery or the point of origin of shipment when such shipment is made by tank car or motor carrier."

Section 10078-01, *et seq., Mississippi Code Annotated,* 1942, (effective January 1, 1970) imposes an excise tax on persons engaged in business as a distributor of lubricating oil within the State of Mississippi. In particular, Section 10078-05, *Mississippi Code Annotated,* 1942, provides:

"Any person engaged in business *as a distributor* or *who acts as a distributor* as defined in this act, *shall pay for the privilege of engaging in such business* or acting as such distributor, an *excise tax* of Two Cents (2¢) per quart upon the sale or use in this State of lubricating oil by the distributor thereof. Provided that *the tax herein imposed and assessed shall be collected and paid to the State of Mississippi but once* in respect to any lubricating oil."

For purposes of this article, Section 10015-02, *Mississippi Code Annotated,* 1942, defined the term "distributor" as follows:

"The term 'distributor' as used in this act shall include (1) Every person who shall sell or distribute lubricating oil for resale, (2) Every person importing, receiving, purchasing, acquiring, using, storing or selling any lubricating oil in this state on which the privilege excise tax hereinafter imposed by this act has not been paid, or the payment of which is not covered by the bond of a qualified Mississippi distributor."

For purposes of this article, Section 10078-02, *Mississippi Code Annotated,* 1942, defines the term "distributor" as follows:

"(c) 'Distributor' means (1) Any person who shall sell or distribute lubricating oil for resale; (2) any person who shall sell or deliver lubricating oil (upon which the tax has not been paid) directly to a consumer; (3) any person who imports, produces, compounds, blends, purchases, or otherwise acquires lubricating oil upon which the tax has not been paid or the payment of which is not covered by the bond of a qualified distributor, and uses, or offers for sale and sells such lubricating oil as defined herein, shall be considered the distributor of such lubricating oil; and the term 'distributor' shall also mean 'refiner' or 'processor' as herein defined, except where the context clearly indicates otherwise."

VI.

Section 4081 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. §4081) provides:

"(a) There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ per gallon."

Section 4091 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. §4091) provides:

"There is hereby imposed on lubricating oil (other than cutting oils) which is sold in the United States by the manufacturer or producer a tax of 6 cents a gallon, to be paid by the manufacturer or producer."

VII.

Section 10104, *et seq., Mississippi Code Annotated,* 1942, provides generally for the taxation on the sale at retail or resale of tangible personal property in the State of Mississippi computed on the basis of gross proceeds of retail

sales. In particular, Section 10108, *Mississippi Code Annotated,* 1942, provides that:

> "Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed, and shall be collected a tax equal to five per cent (5%) of the gross proceeds of the reail sales of the business, except as otherwise provided herein."
>
> "* * * Wholesale sales, as defined in §10104-01, *Mississippi Code Annotated,* 1942, Recompiled, as Amended, shall be taxed at a rate of one-eighth of one per cent (1/8 of 1%) of the gross proceeds of sales, except as otherwise provided.
>
> "* * * Wholesale sales of beer, motor fuel, soft drinks, and syrup shall be taxed at the rate of five per cent (5%) in lieu of the one-eighth of one per cent (1/8 of 1%) wholesale tax, and the retailers shall file a return and compute the retail tax on retail sales but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property, provided adequate invoices and records are maintained to substantiate the credit."

Section 10104, *Mississippi Code Annotated,* 1942, defines the phrase "gross proceeds of sales", as used in this act, as follows:

> "(7) 'Gross proceeds of sales' means the value proceeding or accruing from the full sale price of tangible personal property, including installation charges, carrying charges, or any other addition to the selling price on account of deferred payments by the purchaser, without any deduction for freight, cost of property sold, or other expenses or losses, or taxes of any kind except those expressly exempt by §10116, Mississippi Code of 1942, Recompiled, as Amended."

VIII.

During the period September 1, 1965 through August 31, 1970, Complainant sold gasoline and lubricating oil within the State of Mississippi on which he collected and disbursed both Federal and State excise taxes as required by law.

IX.

During this period Complainant was improperly charged with sales taxes in the amount of $21,160.81 which were erroneous and contrary to law and which were improperly collected by the Defendant on account of the erroneous determination of the sales price of the said gasoline and lubricating oil sold by Complainant during this period. These taxes were paid under protest by Complainant to Defendant by remittances filed with his regular returns. Subsequent to audits, Complainant was assessed for this period additional sales taxes in the amount of $45,947.35. This sales tax liability was based upon Defendant's determination that both the Federal and State excise taxes constitute a valid part of "gross proceeds of sale". Complainant charges and complains that the Defendant's inclusion of the Federal and State excise taxes in his gross proceeds of sale was improper, erroneous and contrary to law, and neither of these taxes constitute a valid part of "gross proceeds of sale."

X.

Complainant has heretofore made full payment of the additional sales tax assessment. Complainant alleges that he alone bore the burden of the taxes herein sued for and did not directly or indirectly collect the taxes from his customers. Complainant further alleges that he has applied to the State Tax Commission by Petitions in writing for hearing and correction of the amount of tax additionally assessed upon him by Commissioner, which Petitioners were denied by Commission.

XI.

That Defendant has refused and continues to refuse to pay over to Complainant the amount of sales taxes erroneously, improperly and unlawfully collected from Complainant to-wit, $67,108.16, or to allow Complainant credit therefor.

XII.

Defendant's refusal to pay over to Complainant said amount or to allow credit therefor is arbitrary, capricious, and contrary to the statutes above cited.

WHEREFORE, Complainant prays that:

1. Process issue and be served on Defendant requiring him to answer this Amended Bill of Complaint in full but oath to his answer is hereby waived.

2. Defendant pay over to Complainant the sum of $67,108.16, together with interest thereon at the highest legal rates from the date of payment or such other sum to which Complainant may be entitled or to allow Complainant credit therefor together with attorney's fees in an amount set by this Court.

3. Complainant have such other and further relief, both general and special, to which this Court may find Complainant entitled.

/s/ W. M. Gurley
Complainant

Thomas, Price, Alston, Jones & Davis
Jackson, Mississippi

Armstrong Allen Braden Goodman
McBride & Prewitt
Memphis, Tennessee
Of Counsel

(Verification Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

GENERAL DEMURRER

(Filed August 5, 1971)

Comes now Arny Rhoden, Chairman and Commissioner of the State Tax Commission of Mississippi, defendant, by his attorneys and demurs generally to the amended bill of complaint filed herein against him on May 26, 1971, in this cause upon the following grounds, to-wit:

(1) There is no equity upon the face of said bill of complaint.

(2) For such other reasons as will be shown upon the hearing hereof.

Arny Rhoden, Chairman, State Tax
Commission of Mississippi,
Defendant

By: /s/ Taylor Carlisle
Post Office Box 960
Jackson, Mississippi 39205

/s/ Wm. G. Burgin, Jr.
Post Office Box 32
Columbus, Mississippi 39701
His Attorneys

(Certificate Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

DECREE OVERRULING GENERAL DEMURRER

(Filed September 28, 1971)

This cause coming on to be heard on the Amended Bill of Complaint for recovery of taxes, penalty and interest improperly and erroneously paid and General Demurrer thereto; and the Court having heard and considered the same together with the arguments of counsel for the Complainant and counsel for the Defendant, and being of the opinion that the said General Demurrer is not well taken and should be overruled:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the General Demurrer in the above entitled and numbered cause be, and the same is hereby overruled, and the Defendant having thereupon applied for leave to file an Answer, and having shown good cause, it is ordered that said Defendant have leave to file an Answer within fifteen (15) days from the date of completion by the Defendant of the inspection of those certain books, papers, documents and things which this Court has ordered the Complainant to make available to the Defendant.

ORDERED, ADJUDGED AND DECREED this the 28th day of September, 1971.

/s/ J. C. Stennett
Chancellor

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

ANSWER AND CROSS BILL

(Filed November 18, 1971)

Comes now Arny Rhoden, Chairman of the State Tax Commission of the State of Mississippi, defendant in the above styled and numbered cause, and for answer to the Amended Bill of Complaint exhibited against him in said cause, answering says:

I.

Defendant admits the allegations of Paragraphs I, II and III of the amended bill of complaint herein.

II.

Defendant admits the allegations of Paragraphs IV, V, VI and VII of said amended bill.

III.

Defendant admits that during the period from September 1, 1965 through August 31, 1970 complainant sold gasoline and lubricating oil within the State of Mississippi, but defendant denies that the defendant "collected and disbursed" federal and state excise taxes thereon, and states the facts to be that this defendant is advised and believes that said complainant during said period was a distributor of motor fuel within the definition of the motor fuel excise tax statutes of the State of Mississippi and a producer, importer or manufacturer of gasoline and lubricating oils within the meaning of the Federal Motor Vehicle Tax laws, and that by virtue of such fact said

complainant became liable for and apparently paid the Federal and State excise taxes levied against him.

IV.

Defendant denies that during the period from September 1, 1965 through August 31, 1970 that complainant was improperly charged with sales tax by the State of Mississippi in the amount of $21,160.81, or any other amount or amounts; denies that said named amount or any other amount was erroneously or improperly collected by the Tax Commission or collected contrary to law, and denies that any error was made against the complainant in the determination of the sales price of gasoline and lubricating oil sold by said complainant during said period, and denies payment of any such taxes by complainant under protest. Defendant admits that during the period from September 1, 1965 through August 31, 1970 complainant was assessed for additional sales tax liability, but defendant denies that such additional assessments were made subsequent to audits and denies that such additional assessments amounted to the sum of $45,947.35. Defendant admits that complainant's sales tax liability is to be determined by inclusion of both federal and state excise taxes as a valid part of gross proceeds of sale subject to sales tax under applicable Mississippi statutes, and denies that the inclusion of such taxes in complainant's gross proceeds of sale was improper, erroneous or contrary to law, and denies that such taxes do not constitute a valid part of gross proceeds of sale under Mississippi Sales Tax law.

And further answering, defendant would show that it has endeavored through audit of a portion of complainant's books and from an examination of the sales tax returns filed with defendant by such complainant to ascertain the basis of the $21,160.81 figure and the $45,947.35 figure alleged by complainant in Paragraph IX of the amended

bill of complaint, and defendant has been unable to establish any rational, reasonable or other basis therefor. Defendant therefore demands strict proof of such figures upon the trial of this cause, with specific reference to dates and amounts of each such alleged payment purporting to aggregate said amounts. Defendant would show that as shown by Exhibit "A" hereto attached, by order of the State Tax Commission dated March 25, 1969, complainant was assessed with additional sales tax and damages in the amount of $14,729.29 for the period from September 1, 1965 through January 31, 1969, and that such assessment has been paid by complainant.

And further answering, defendant states the facts to be that subsequently, on October 7, 1970, an additional assessment was made against complainant for additional sales tax, penalties and interest for the period from February 1, 1969 to August 31, 1970 in the amount of $27,390.91, and said assessment remaining unpaid, warrants were issued for collection of the same on October 27, 1970, and such assessment was paid by complainant on November 9, 1970. Complainant filed no petition for a hearing or correction of amount of additional sales tax assessed with defendant, in the manner provided and required by Section 10121 of the Mississippi Code, Recompiled.

V.

Defendant admits payment of additional sales taxes assessed against defendant, but denies such payments aggregated the amounts alleged in said original bill, and states the facts to be that the additional sales taxes assessed against and paid by said complainant for the period from September 1, 1965 through August 31, 1970 was the sum of $42,120.20. Defendant denies that complainant alone bore the burden of the taxes sought to be recovered by him in said amended bill, and denies that such taxes were not directly or indirectly collected by complainant

from his customers. Defendant further denies that complainant has made any application for a hearing and correction of the additional tax assessment made against him for the period from February 1, 1969 through August 31, 1970, but admits that he applied for and was afforded a hearing, and correction and refund of the tax assessed against him for the period from September 1, 1965 through January 31, 1969 was denied by the State Tax Commission.

VI.

Defendant admits that it has refused and continues to refuse to make any refund of sales taxes paid by complainant; but denies that any sales taxes so assessed, collected or paid by complainant were erroneously, improperly or unlawfully collected from him, and denies complainant is entitled to any such refund or credit therefor, in the amount alleged in Paragraph XI, or any other amount or amounts.

VII.

Defendant denies the allegations of Paragraph XII of said Amended Bill.

And now having fully answered the amended bill of complaint exhibited against him, defendant, for and on behalf of the State Tax Commission of the State of Mississippi, of which he is Chairman, and on behalf of the State of Mississippi, makes this his answer a Cross Bill against complainant W. M. Gurley, doing business as Gurley Oil Company, and would respectfully show unto the Court the following facts, to-wit:

I.

That the defendant and cross-complainant is Chairman of the Mississippi State Tax Commission and is charged by law with collection of all sales taxes levied under the statutes of the State of Mississippi; and that the complainant and cross-defendant, W. M. Gurley, doing business as Gurley Oil Company, is authorized to do business in and is and has been engaged in business within the State of Mississippi; and that by virtue of such business operations has become and is liable for payment of sales taxes to the State of Mississippi as will be more particularly alleged herein.

II.

Cross-complainant would further show that under the terms and provisions of the Mississippi Sales Tax law, being Sections 10103 through 10139 of the Mississippi Code, Recompiles, and specifically under Section 10108 of the Mississippi Code, Recompiled, there is levied

> "Upon every person engaging or continuing within this State in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five per cent (5%) of the gross proceeds of the retail sales of the business, except as otherwise provided herein."
>
> "- - - Wholesale sales as defined in Section 10104-01, Mississippi Code of 1942, Recompiled, as amended, shall be taxed at the rate of one-eighth of one per cent (1/8 of 1%) of the gross proceeds of sales, except as otherwise provided."
>
> "- - - Wholesale sales of beer, motor fuel, soft drinks and syrup shall be taxed at the rate of five per cent (5%) in lieu of the one-eighth of one per cent (1/8 of 1%) wholesale tax and the retailer shall file a return and compute the retail tax on retail sales, but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property, provided adequate invoices and records are maintained to substantiate the credit."

Cross-complainant would further show that cross-defendant is engaged in the wholesale and retail sale of motor fuel and other tangible personal property within the State of Mississippi, and has been so engaged for the period from September 1, 1965 through and including the 31st day of August, 1971, and that by virtue of the aforesaid statute said cross-defendant became liable for payment of sales taxes to the State of Mississippi. Cross-complainant would further show that for the period from February 1, 1969 through August 31, 1970 said cross-defendant had gross sales within the State of Mississippi subject to sales tax in the amount of $400,715.18, and that by virtue of such sales there accrued a sales tax liability to the State of Mississippi in the amount of $2,299.86 more than the amount of such sales taxes paid by said cross-defendant to the State of Mississippi for said period, as shown by auditor's work papers attached to this Cross Bill as Exhibit "B". Cross-complainant would further show that in accordance with the provisions of the Sales Tax law said cross-defendant is likewise indebted for a penalty in the amount of twenty-five per cent of said past due tax amounting to $574.97, together with interest thereon at the rate of one per cent (1%) per month of $305.92, and that the total amount due and owing to cross-complainant by said cross-defendant for said period is the sum of $3,-180.75.

III.

Cross-complainant would further show that for the period from September 1, 1970 to August 31, 1971 the cross-defendant has understated and underpaid his sales tax liability in the amount of $22,241.41, and that he is indebted to cross-complainant in said amount, plus penalties accruing thereon in the amount of twenty-five per cent (25%) of $5,560.20, plus interest at the rate of one per cent (1%) per month of $1,986.67, making a total additional sales tax liability due by said cross-defendant for such period of $29,788.28. Cross-complainant attached hereto as Exhibit "C" work papers of audit of cross-defendant's records for said period showing the manner in which such additional tax liability was computed.

IV.

Cross-complainant would further show that it is entitled to judgment against said cross-defendant in the amount of $32,969.03 for such additional sales taxes due, together with interest at the rate of one per cent (1%) per month thereon from November 1, 1971 until paid.

WHEREFORE, PREMISES CONSIDERED, defendant and cross-complainant prays that this its Answer and Cross Bill may be received and filed; and that upon the final hearing hereof the Amended Bill of Complaint exhibited against him may be dismissed; and that cross-complainant may have and recover of and from said cross-defendant W. M. Gurley, doing business as Gurley Oil Company, the sum of $32,969.03 together with statutory interest at the rate of one per cent (1%) per month thereon from November 1, 1971 until paid, and together with all court costs accruing in this cause.

And cross-complainant prays for such other, further and general relief as may be mete and proper in the premises, as in duty bound he will ever pray.

Mississippi State Tax Commission

By /s/ Arny Rhoden
Chairman

William G. Burgin, Jr.
Taylor Carlisle
Post Office Box 960
Jackson, Mississippi
Attorneys for Defendant and
Cross-Complainant

(Verification and Certificate Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

ANSWER TO CROSS-BILL

(Filed January 13, 1972)

Now comes the Complainant and Cross-Defendant, W. M. Gurley, d/b/a Gurley Oil Company, and for answer to the Cross-Bill of Defendant and Cross-Complainant, Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi, he denies all of the affirmative allegations contained in the Answer of the Defendant and Cross-Complainant and hereby incorporates and reiterates all of the allegations of his Amended Bill of Complaint in response to said Answer, and further answering paragraph by paragraph, the averments of the Cross-Bill, answers and says:

I.

Cross-Defendant admits the allegations of Paragraph I of the Cross-Bill, except Cross-Defendant denies that he is liable for payment of sales taxes to the State of Mississippi for the period from September 1, 1965 through and including the 31st day of August, 1971, in addition to the sales taxes which have been paid by the Cross-Defendant for this said period.

II.

Cross-Defendant denies each and every allegation of Paragraph II of the Cross-Bill except Cross-Defendant admits the terms and provisions of the Mississippi Sales Tax Law and Cross-Defendant admits that he is engaged in the wholesale and retail sale of motor fuel and other tangible personal property within the State of Mississippi and has been so engaged for the period from September 1, 1965 through and including the 31st day of August, 1971, and the said Cross-Defendant became liable by virtue of said statutes for the payment of a certain amount of sales taxes to the State of Mississippi.

III.

Cross-Defendant denies the allegations of Paragraph III of the Cross-Bill.

IV.

Cross-Defendant denies the allegations of Paragraph IV of the Cross-Bill.

And now having fully answered, Cross-Defendant prays to be dismissed with his costs.

/s/ W. M. Gurley
Complainant and Cross-Defendant

Thomas, Price, Alston, Jones & Davis
507 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205

Armstrong, Allen, Braden, Goodman,
McBride & Prewitt
Fifteenth Floor
Commerce Title Building
Memphis, Tennessee 38103
Of Counsel

(Verification Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

STIPULATION

(Filed January 20, 1972)

It is stipulated and agreed by and between counsel for the Complainant and Cross-Defendant, W. M. Gurley, and the Defendant and Cross-Complainant, Arny Rhoden, as follows, to-wit:

1. That during the period from September 1, 1965, through August 31, 1971, Complainant and Cross-Defendant sold gasoline within the State of Mississippi, which sales of motor fuel were subject to Mississippi state sales tax in accordance with the provisions of Section 10104, et seq. of the *Mississippi Code of 1942*, Recompiled.

2. That the primary issue in controversy between the parties herein is whether, under the provisions of the Mississippi Sales Tax Law referred to above, the taxes levied by the United States under the provisions of Section 4081 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. § 4081), and the taxes levied under the provisions of Section 10013-01, et seq. of the *Mississippi Code*, Recompiled (for the period ending January 1, 1970), and by Section 10076-01, et seq. of said Code (for the period from January 1, 1970, through August 31, 1971), on the gasoline sold by Complainant and Cross-Defendant, are properly includable within gross proceeds of sales for the purpose of computing the sales tax liability of Complainant and Cross-Defendant for the periods involved.

3. That if the Federal excise tax on gasoline and the Mississippi state excise tax thereon are not legally includable in gross proceeds of sales subject to the sales tax, then, subject to the reservations hereinafter set forth, the

Complainant would be entitled to recover from the Defendant the following amounts heretofore paid by said Complainant for the respective periods indicated.

a. The sum of $14,981.23 paid on April 14, 1969, by said Complainant as the result of an additional sales tax assessment (which includes penalties and interest thereon) made by Defendant against him for the period beginning September 1, 1965, through January 31, 1969.

b. The additional sum of $27,390.91 paid by Complainant to Defendant as the result of an additional assessment of sales taxes (which includes penalties and interest accruing thereon) under a jeopardy warrant for the period from February 1, 1969, through August 31, 1970, such payment having been made by Complainant on November 10, 1970.

c. The additional sum of $19,542.67, being that portion of sales tax payments made by Complainant to Defendant for the period from September 1, 1965, through August 31, 1971, under protest, which would not have been due or payable had the Federal and State excise taxes on gasoline been excluded from gross proceeds of the sales of such products by Complainant in computing his sales tex liability for said period, the computation of which amount is more particularly itemized and shown by Exhibit "A" hereto attached consisting of fourteen (14) pages which cover the entire period of time shown above.

d. The additional sum of $867.76, being costs of collection of the jeopardy warrant referred to in subparagraph 3b above.

4. That payment of the amount specified and set forth in paragraph 3c above (if the Court should determine that such State and Federal excise taxes are not legally includable in gross sales) shall be subject to the Court's decision of the question of whether all or any portion of the amount therein mentioned is barred under the

provisions of Section 10121.2 of the *Mississippi Code,* Recompiled, which provides a three-year statute of limitations on suits to recover sales taxes.

5. That if the Court should decide the primary issue in favor of the Complainant herein, said Complainant would be entitled to interest on the amount of his recovery at the legal rate from the dates of payment.

6. That if the Court should determine the primary issue involved herein of whether the Federal and State excise taxes on gasoline referred to above are legally subject to be included in gross proceeds of sale for the purpose of computing the Complainant's sales tax liability in favor of the inclusion of such taxes, then, in that event, the Defendant and Cross-Complainant shall thereupon be entitled (subject to the reservations hereinafter set forth) to recover from the Complainant and Cross-Defendant the following sums for the respective periods indicated:

a. Additional sales taxes in the amount of $2,299.86, plus such penalties and interest thereon as are provided by law, for the period from February 1, 1969, through August 31, 1970, said additional tax liability being as computed and shown on the Supplemental Additional Sales and Use Tax Return with supporting documents attached hereto as Exhibit "B", consisting of two (2) pages.

b. Additional sales taxes in the amount of $22,241.41, plus such penalties and interest thereon as are provided by law, for the period from September 1, 1970, through August 31, 1971, said additional tax liability being as computed and shown on the Supplemental Additional Sales and Use Tax Return with supporting documents attached hereto as Exhibit "C", consisting of two (2) pages.

7. That the provisions of Paragraph 6 above are expressly subject to the following which constitutes a question which is not stipulated or agreed upon but is left open for decision by the Court under proof and the applicable law:

Whether Complainant's method of selling gasoline at certain locations, being the Bolden Grocery, Broadway Grocery, Thompson Grocery and Riley Grocery, and any other stations similarly operated during the period from September 1, 1965, through August 31, 1971, constituted retail sales of such products by Complainant taxable for sales tax purposes to him, insofar as amounts paid from gross sales by Complainant to the store owners is concerned.

8. That the parties hereto have made no stipulation or agreement, in any event, that the Complainant and Cross-Defendant alone bore the burden of the taxes sought to be recovered by him in this proceeding, which question shall be determined by the Court on proof.

9. That the Federal excise tax on diesel fuel is levied and imposed on the retail sale of such diesel fuel, and such taxes have, therefore, been excluded by both parties in computing the respective amounts alleged by each of them to be due.

APPROVED AND AGREED TO on this the 20th day of January, 1972.

W. M. Gurley, d/b/a Gurley Oil Company, Complainant and Cross-Defendant

By /s/ Charles R. Davis

/s/ Hubert A. McBride

/s/ David H. Nutt

Amy Rhoden, Commissioner and Chairman of the State Tax Commission of the State of Mississippi

By /s/ Taylor Carlisle

/s/ James E. Williams

/s/ Wm. G. Burgin, Jr.

(Exhibits omitted in printing)

[119] IN THE
CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

NOS. 81,953 and 82,374

(Title of Consolidated Cases Omitted in Printing)

TRANSCRIPT OF TRIAL IN THE CHANCERY COURT

APPEARANCES:

Mr. Charles Ray Davis, of Thomas, Price, Alston, Jones & Davis, First National Bank Building, 507 First National Bank Building, Post Office Drawer 1532, Jackson, Mississippi 39205, and

Mr. Hubert A. McBride, of Armstrong, Allen, Braden, Goodman, McBride & Prewitt, Fifteenth Floor, Commerce Title Building, Memphis, Tennessee 38103

PRESENT AND REPRESENTING THE COMPLAINANT —W. M. Gurley, d/b/a Gurley Oil Company.

[120] *Mr. William G. Burgin, Jr.,* P. O. Box 32, Columbus, Mississippi 39701, and

Mr. Taylor Carlisle, P. O. Box 960, Jackson, Mississippi 39205, and

Mr. James E. Williams, P. O. Box 960, Jackson, Mississippi 39205,

PRESENT AND REPRESENTING THE DEFENDANT— Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi.

BE IT REMEMBERED, that on, to-wit, the 21st day of January, 1972, one of the days of the regular January, 1972 Term of the Chancery Court aforesaid, the above entitled matter came on for hearing in the Hinds County Chancery Courtroom No. 3, in the Chancery Court Building at Jackson, Mississippi, before the Honorable J. C. Stennett, Chancellor of the Fifth Chancery Court District of the State of Mississippi, sole presiding, when and where the following proceedings were had and entered of record, to-wit:

W. M. GURLEY

having been first duly sworn, was called as a witness on behalf of the Complainant, and testified as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Gurley, state your name, please, sir. [121] A. W. M. Gurley.

Q. Where do you reside, Mr. Gurley? A. Memphis, Tennessee.

Q. Have you always resided in Memphis, Tennessee? A. No, sir.

Q. Where are you from originally? A. I was born and raised near Potts Camp, Mississippi, Marshall County.

Q. How long did you reside there in Marshall County? A. In excess of 18 years.

Q. Now what is your occupation, Mr. Gurley? A. I'm in the oil business, in the gasoline and lubricating oil business.

Q. What has been your experience in the gasoline and lubricating oil business? A. Well, I first started in the—dealing with lube oils back in 1947. I started in the gasoline business, or got into that phase of it in 1953, building my first station at Olive Branch, Mississippi.

Q. All right. Now since 1953 what has been the development of your business operation in the State of Mississippi? A. Well, I have several additional locations

within the State of Mississippi as well as stations in Tennessee and Arkansas.

Q. All right, sir. Describe to the Court, Mr. Gurley, the type of operation that you have in the State of Mississippi. [122] A. Well, of course, I have a retail operation in the State of Mississippi, which the majority of my business is retail, that I control and operate with salaried employees. I do have a few locations, grocery stores that we do supply some products to, that this is done on a basis that I do not control the employees within these particular locations.

Q. So is it your testimony that you have a certain number of retail gasoline stations in the State of Mississippi? A. Yes, sir.

Q. Approximately how many do you have? A. Well, I control and operate with salaried employees five locations in North Mississippi.

Q. Tell us generally where these stations are located, if you will. A. I have one at Nesbitt, one at Olive Branch, one at Byhalia, one at Potts Camp, and one at Walnut, Mississippi.

The little grocery store operations are at Lewisburg, Victoria and north of Holly Springs. We only have three of those type operations at the present time.

Q. State whether or not the grocery store operation that you do not control, state what percentage of your total business approximately is done through those outlets. A. Oh, probably ten or twelve percent of our business would be done in these particular outlets.

Q. So you are testifying that essentially you have a retail operation in the State of Mississippi? A. Yes, sir.

[123] Q. Now, Mr. Gurley, I will ask you to describe to the Court the nature of your business operation in Mississippi. Tell us how it works. A. Well, of course, the product that we sell within the State of Mississippi is

either pulled from Tennessee or from Arkansas. This is number one, as to where we get our gasoline and diesel fuels from, it comes from those two particular outlets, and, of course, we buy on the market wherever we can buy a product at the most economical price, again getting quality product.

Q. Excuse me, Mr. Gurley, if I may interrupt you: You are testifying about the purchase of your product.

Your Honor, we have an exhibit which has been prepared here, and I would like for Mr. Gurley to refer to it in connection with his testimony if we may put that up at this point.

By the Court:

All right, you may.

(Exhibit displayed in front of the witness and the court).

By Mr. Davis (Continuing):

Q. All right, sir. A. This gasoline is purchased, as you can see, at approximate price, since we are including regular and premium, at an approximate price of 14¢ per gallon and, of course, this is picked up within our own trucks, [124] transported into the State of Mississippi, and we in turn then are putting it on the market for sale in the categories and brackets of approximately—this figure does fluctuate; because of the retail price of gasoline, it would fluctuate this—at a price of approximately 20¢ per gallon. We then do charge or collect from the people, built into our pump price, a cent a gallon, a 5% rate on evaluation of 20¢ which would be a cent a gallon, which would give us a total price of 21¢ per gallon. Then over and above that we collect federal tax in the amount of 4¢ per gallon, and then we collect state tax, up to 1970 in the amount of 7¢; from 1970 on we have been collecting 8¢ per gallon.

Q. What type of tax is this that you collect? A. Well, this is—The first one is the federal excise tax, and the Mississippi state is a gasoline tax.

Q. These two taxes are excise taxes on the sale of gasoline, . . . A. Yes, sir.

Q. . . . is that correct? A. Yes, sir.

By Mr. Burgin:

We object to that and move that it be stricken on the ground that it is a conclusion of the witness. The statute speaks for itself.

By the Court:

Well, the Court would think so. Let's move along.

[125] By Mr. Davis (Continuing):

Q. Now, Mr. Gurley, describe to the Court, if you will, who bears the burden of the 1¢ sales tax that's shown on the exhibit there. A. In our pump prices, and in our computation of this, this 1¢ is borne by the person that is paying for the product; in other words, that is included and we classify that as a part of the sale price. In other words, the customer bears that 1¢.

Q. All right, sir. State whether or not you have passed on to the ultimate consumer any amount of tax which you seek to recover in this action. A. No, sir, we have not. This portion and sales tax part of it, these taxes, has been borne completely by me.

Q. Describe to the Court in a little more detail what you're referring to now. A. Well, what I'm saying is that in computing this, we classify that this is a sale at the ending point of product cost, plus our markup, plus a sales tax on that. That is where we consummate as far as sale is concerned. The other is a collection and not a sale. Therefore, we are unable to pass along to the customer a sales tax in excess of 5% over and above a sale, and that's what we classify as a sale.

Q. State whether or not you have collected from the ultimate consumer or customer of yours any amount of sales tax on the federal and state gasoline tax. A. In our retail outlets we have not collected [126] anything in these particular categories.

Q. Now do I understand that you're testifying, then, that you have borne the burden of the tax that you seek to recover in this action? A. Yes, sir.

Q. You have not passed this on to the ultimate consumer? A. No, sir.

Q. Now, Mr. Gurley, is that true in all instances? A. We have made some wholesale sales, and this constitutes maybe a matter of maybe $10,000 total within this whole realm of time that we have made sales to customers outside of our own stations. In other words, we would classify them as wholesale sales, and in those sales out there, of course, it would be a different story. In two instances we charged the full amount of 5% on the total amount of the invoice, and this would constitute—I say two, really it's one customer—this will constitute probably two, maybe a couple of thousand dollars worth of sales.

Q. How does that compare with the total amount of sales we're talking about in this lawsuit? A. We're talking about in this total lawsuit of some four and a half million dollars worth of total sales, compared to maybe $2,000 or $2,500 in this particular category here.

Q. Approximately what percent of the total amount involved here would that be? [127] A. Well, it would be less than 1/10 of 1%.

Q. All right, sir. A. I might say in other instances, though, where we have sold some gasoline on a wholesale basis where we felt that all we would have to pay would be the 1/8 of 1% wholesale tax, this constituted about $6,000 worth of sales. The state has contended that we

owe 5% and have charged us back, and we have had to bear, or in the bill it is bearing a 5% tax against this where we collected nothing.

Q. All right, sir. Mr. Gurley, I will ask you now to describe to the Court and tell the Court what preparations you make before bringing a product into the State of Mississippi. A. We have to give the State of Mississippi an import notice. This is notification that we are bringing products into the State of Mississippi. This has to be postmarked prior to the product coming into the State of Mississippi. This notice is mailed, and it is a triplicate notice. The one notice goes on to the State of Mississippi and we retain two copies, then at the time of preparing our tax report, which has to be filed by the 20th of the following month, one copy of this is affixed to our report and is forwarded to the State of Mississippi in order for them to reconcile the import notice that was mailed to them. On that report we list the import notice, the company from whom it was purchased, and the product, whether it is diesel or gasoline or whatever it might be that we're bringing into the State of Mississippi.

[128] Q. All right, sir. Now I'll ask you, Mr. Gurley, to describe to the Court generally what procedure you follow in handling the federal excise tax on the sale of gasoline which is shown on your exhibit here, poster, as being 4¢ per gallon. A. The 4¢ a gallon federal tax on gasoline and diesel fuel is reported on a federal form that— by making a request that we want to pay our taxes on an individual basis or by— In other words, we file the report. They will issue us and put us in the mail this particular form which is a quarterly report. Now we have to make federal depositories on this product three working days after the first, and three working days after the fifteenth of each month. Then at the end of a quarter, we have a full month to reconcile any deficiencies or over-

payments that we might have asked for. It is deficiency; we do not ever overpay. In this area, to reconcile this quarterly report, at the end— In other words, we have 30 days after a quarter ends in order to compute this and forward this in to the I.R.S.

Q. All right, sir. Now you referred to the fact that you actually transmit funds to a federal depository three working days after the first and three working days after the fifteenth of each month. Now state to the Court what relationship the time of filing those depositories has to the actual sale of the gasoline. A. This is computed on the actual product that has moved to the consumer. This is the way that we compute [129] this. In other words, this is computed against a beginning inventory, receipts, less a closing inventory, and then we pay against the actual gallons that has been sold by the consumer in both of these categories.

Q. So you pay— Are you testifying, then, that you pay the federal excise tax on the basis of actual gallons sold to a consumer? A. That is correct.

Q. Mr. Gurley, I'll ask you what do you have to do in order to meet federal requirements in order to pay the federal excise tax on the basis which you have described. A. There is no bond or any prerequisite that we have to set up in order to get this. You merely give the Internal Revenue Service notice that you want to pay this tax, and they will give you the number, which, incidentally, is the same number as your Social Security withholding tax number. These two numbers are one and the same, but they are reported on different forms.

Q. State whether or not you actually pay in the same deposit and on the same number the Social Security and withholding tax that is collected for the government which relates to your employees. A. I'm not— Restate that question, would you, please?

Q. State whether or not, Mr. Gurley, you pay Social Security and withholding taxes to the federal government on your employees . . .

[130] By Mr. Burgin:

We object to this. It's immaterial to the lawsuit, the issues involved.

By The Court:

Up until this point, the Court feels—
Let him finish the question.
Have you finished your question?

By Mr. Davis:

I'll withdraw the question. I think he has already answered it.

By The Court:

All right. The objection will be sustained.

By Mr. Davis (Continuing):

Q. Mr. Gurley, state whether or not you have to be a manufacturer in order to get this number from the Internal Revenue Service. A. I am not a manufacturer of gasoline, and there is no—there was no problem whatsoever for me to obtain this permission.

Q. You're not a manufacturer; what category do you fall in? A. Well, I'm a retailer of gasoline and diesel fuel.

Q. All right, sir. Mr. Gurley, state whether or not there is any distinction between your method of handling the federal excise tax on the sale of gasoline and that on the sale of diesel. A. There is no differential whatsoever. It is made and reported on the same form, the federal depositories [131] are made one and the same, there is not a separation between the federal depository between gasoline and diesel fuel. There is a separate depository between gasoline, diesel fuel, and Social Security and withholding, there are two separate depositories on that, but there is no separation between gasoline and diesel fuel.

Q. State whether or not, Mr. Gurley, it is permissible for the retailer to pay the federal gasoline tax or not. A. Well, I'm a retailer and I'm able to pay this, consequently a retailer can pay the federal excise tax.

Q. Are you testifying, then, that it's not necessary for you to be a manufacturer to pay this tax? A. No, sir, it is not necessary.

Q. When I say "pay the tax", or when you say "pay the tax", what are you referring to there? A. I'm referring to collecting it from the customer, retaining this until the prescribed time to make payment to the federal government. In other words, it is first collected before it is paid; it is not paid before the collection is made.

Q. All right, sir. Mr. Gurley, I'll ask you to describe to the Court, please, sir, your method of handling the state excise tax on the sale of gasoline and diesel fuel which is referred to on your exhibit as being 7¢ per gallon and which you testified to earlier as since January 1, 1970, being 8¢ per gallon. A. Well, of course, anything that is brought into the state within a calendar month, for computing purposes [132] is subject to taxation or to payment of tax by the 20th of the following month, and of course as I have already described, the method of forms that we use in order to comply with the state requirement and that the payment would be required to be made by the 20th of the following month.

Q. All right, sir. State whether or not, Mr. Gurley, the state excise tax on the sale of gasoline is actually collected by you from the consumer prior to the time that you transmit it on to the State of Mississippi. A. Yes, sir, it is collected by me prior to me passing it on. The reason that all of this is collected is the fact that there is never more than a seven-day supply of product on hand at any

time. Consequently, by the 7th of the following month all sales have been made, which is some 13 days prior to me paying the tax on this product.

Q. All right, sir. Now, Mr. Gurley, I'll ask you whether or not you are required by the State of Mississippi to put up a bond in connection with the state excise tax on gasoline. A. Yes, sir. It is a requirement made to put up bond with the State of Mississippi.

Q. And what's the purpose of this bond? A The purpose of this bond is to assure the state that I will perform and pay the tax as prescribed within their law.

[133] Q. Mr. Gurley, what happens in the event of fire or spillage of gasoline after you have purchased it and brought it into the State of Mississippi prior to the time of actual sale by you? A. If there is any excessive loss such as a fire or a vehicle being turned over, fire or spillage, then there is a form that we fill out and certify to that this product was lost and credit can be taken against the payment of our tax.

Q. At what point is this credit taken? A. Well, actually it is taken at the time that the accident really happens; in other words, the time that the spillage or that the fire would occur.

Q. All right, sir. State whether or not you ever actually transmit any tax to the State of Mississippi on such gasoline. A. No. There would be no reason for this, in the fact that it would be permissible to take credit on this.

Q. So are you testifying that by the time you actually file your return, that you've been able to effectuate this credit? A. Yes. sir.

Q. Now describe to the Court, Mr. Gurley, what happens in the event that you bring gasoline into the State of Mississippi and then take it back out of the State of Mississippi prior to the time of a retail sale. A. There's

also a form there that the State of Mississippi has for a claim against product that is [134] brought into the state and you take it, remove it back out of the state to where you can also receive credit against this product that was taken out of the state.

Now this has to be correlated with a substantiating report that this product went somewhere else into another state, and corroborating information has to be supplied to them from the other state where the product went into.

Q. Is it your testimony, then, that you never actually pay any tax or transmit any tax on to the State of Mississippi on such gasoline that is brought in and taken back out? A. There would be no need for that, and by expediting your paper work you would be able to do this.

Q. All right, sir. State whether or not, Mr. Gurley, you are allowed as a retailer—

State whether or not you are allowed as a retailer of gasoline to take an evaporation allowance on your sales of gasoline. A. Yes, sir. There is a 2% evaporation and spillage allowance in reporting your tax. This is deducted from the net gallons at the time of making the report.

Q. Now are you referring to the state excise tax on gasoline? A. Yes, sir.

Q. All right, sir. Is this also true in connection with the federal excise tax ? A. No, sir. The federal does not prescribe any evaporation losses. They work strictly from the amount of product that has actually been sold.

[135] Q. Mr. Gurley, is this evaporation allowance under the state excise gasoline tax procedures allowed on both diesel and gasoline? A. No, sir. It is only allowed on gasoline.

Q. Now explain that to the Court. A. Well, the purpose in this being that gasoline is a very volatile and very highly evaporative material; in other words, it will evaporate, and consequently the diesel fuel will not

evaporate, and the intent of this is that the net number of gallons that the customer receives, the evaporation would absorb this loss factor and that no tax would be collected against the customer over and above what actually had been sold. Actually it would be less than what had been sold, is really what it would amount to, by taking this 2% evaporation.

Q. State whether or not you're saying that the evaporation allowance is for the purpose of putting the tax on net gallons into the tank of the customer. A. That is the purpose of that, to make sure that there is that many gallons to be sold to the customer out there.

Q. State whether or not in a period from the time that you purchase the gasoline in Arkansas or Tennessee from a supplier or manufacturer, until the time that you through your pumps sell it to an ultimate consumer, there is an evaporation of gasoline in that period. A. That's correct.

[136] Q. Mr. Gurley, state to the Court, please, sir, when the state excise tax on gasoline is paid on gasoline which is brought into the State of Mississippi by a distributor and stored in this state. A. When a distributor brings the product in and stores it into a bulk storage operation, the tax on this product is payable after it is conveyed to an ultimate retail outlet or a consumer account.

Q. State whether or not the tax in this case is paid when the gasoline is brought into the State of Mississippi. A. No, sir, it is not computed on what is brought into the State of Mississippi.

Q. What is it computed on? A. It's computed— I say it's computed and paid after it is delivered to either a retail outlet or a consumer account. In that particular calendar month is when it's prescribed and paid for.

Q. I see. Mr. Gurley, I'll ask you, please, sir, to generally and briefly describe to the Court and compare for

the Court your operation with that of a major oil company's operation. A. Well, of course, there is a considerable amount of differentiation in this. For instance, in my case, there is no middleman or men between the manufacturer or supplier and the ultimate retailer. In other words, I am—take all those gaps in between there. For a major oil station, they might have two or three different methods of handling this, but one of the more common ones is what is called a [137] distributor. This distributor has the product in a bulk storage tank, and when he removes this product and carries it to the service station, puts it in his tanks, he renders to that man an invoice. On this invoice he lists the product, the number of gallons, the price per gallon, and extends this price on out. When he gets down to—When he finishes this, then he will apply the federal tax, the state tax, . . .

By Mr. Burgin:

I object to that, Your Honor, unless this man knows this of his own personal knowledge. Furthermore, the invoices would be the best evidence of it.

By the Court:

The Court would think so, but he can testify if he knows.

Let's go along.

A. He would list the federal tax, the state tax, gasoline tax, and any other state or county taxes that might be applicable in this particular case.

By Mr. Davis (Continuing):

Q. All right, sir. State whether or not, Mr. Gurley, in the usual major oil company operation you have the involvement of a sale by the manufacturer or major oil company to a distributor, a sale by that distributor to a retail operator, and a sale by that retail operator to the

ultimate consumer. A. Well, this is basically what happens. Now that distributor might be a consignee and he may report as a [138] basic employee of this manufacturer, but he could also be an independent operator. In other words, there are two categories here that they fall into, so he could be one of the two, and it could be an invoice from the major oil company to the distributor, then an invoice from the distributor to the retail station, and then the retail station making a sale to the ultimate consumer.

Q. Mr. Gurley, I'll ask you whether or not in your operation there is a sale from the manufacturer or supplier in Tennessee or in Arkansas to you, and then a sale by you to the ultimate consumer. A. There is a sale of the product to me, but the sale is made with no taxation included at all. This is just the bare product as we're listing here, and then all of the additional are collected from the consumer by myself.

Q. State whether or not there is any tax—by "any tax" I mean—Well, strike that.

State whether or not there is any federal or state excise tax charged to you by the supplier or manufacturer on that sale of the product of your supplier to yourself. A. No, there is not. There is no tax at all on it.

Q. Mr. Gurley, I'll ask you, sir, to state whether or not you were ever allowed by the State of Mississippi to exclude state and federal excise tax from gross proceeds of sale in your computation of sales tax to the State of Mississippi. A. They do permit the deduction of the 4¢ federal tax on diesel fuel only in arriving at the sales tax.

[139] Q. All right, sir. Now is that the situation at this time? A. That is the situation at this time.

Q. I'll ask you whether or not at any point in the past you have ever been allowed to deduct the federal and state excise tax on gasoline. A. Yes, sir. In the early years of operation, which was when I first started in 1953,

we were able to deduct the federal and state tax from the computation of sales tax.

Q. All right, sir. When did this stop, approximately? A. Oh, sometime in the fifties, in there, in the middle or late fifties.

Q. What happened at that time with regard to the procedure which you followed in reporting your sales tax to the State of Mississippi? A. Well, of course, this naturally created some controversy and some discussion, and one of my competitors, Mr. Langston, said that he was having a man to come up and discuss the sales tax . . .

By Mr. Burgin:

We object to that as being hearsay.

By Mr. Davis:

Your Honor, he's testifying to what he heard of his own personal knowledge.

By the Court:

Well, it wasn't in the presence of any of these defendants and cross-complainants, so the objection will [140] be sustained.

By Mr. Davis (Continuing):

Q. All right, Mr. Gurley. I'll ask you, sir, what occurred then after approximately 1960 when you were not allowed any longer to deduct federal and state excise tax. A. There was a meeting, I was present, Mr. Langston, and someone from the Mississippi Tax Department, Sales Tax Department, was at his place describing what could be done and the method of handling it.

By Mr. Burgin:

We object unless the witness identifies the person alleged to be from the Tax Commission, Your Honor.

By the Court:

If he knows he was from the Tax Commission, I don't think he would be required to know his name.

Q. Could you further identify the tax representative? A. Your Honor, I don't recall the name.

By the Court (Continuing):

All right. We'll let him testify if he knows that's where he was from.

By Mr. Davis (Continuing):

Q. Go ahead, Mr. Gurley. A. And at this time in the discussion, which was carried basically by Mr. Langston, that in order to arrive at something equitable out here as far as what he wanted to do, the method of paying taxes, and discussing with [141] the tax man, it was agreed at that point that a price of 23.5 per gallon would be acceptable to use this as a basis for computing the income, total income of sales from gasoline, and that sales tax would be computed on this basis.

Q. All right, sir. Now what was the situation with regard to diesel? A. Diesel fuel was set up on 21.5.

Q. Now, Mr. Gurley, did you follow this procedure in making your sales tax returns from that point forward? A. Yes, sir, we did.

Q. How long did you continue that procedure? A. We continued that procedure—The fact of the business, we continued to follow that procedure up until just a few months ago.

Q. All right, sir. Why did you change your procedure a few months ago? A. Well, of course, we are involved in the proceedings here today with the State of Mississippi.

Q. Now, Mr. Gurley, I'll ask you whether or not you paid your taxes during that period of time, from approxi-

mately 1960 down to a very short while ago, to the Sales Tax Commission of Mississippi under protest. A. Yes, sir. We paid these, and across the face of our tax reports just wrote "Paid under Protest"; even though I paid the 23.5, I did not agree with this, because this was also including part of the federal and state tax involved in this.

[142] Q. Mr. Gurley, I'll ask you now, sir, to describe to the Court your method of computing gross receipts for the purpose of complying with the Fair Labor Standards Act. A. Well, of course, in complying with this, any location that does in excess of $250,000 per location has to comply with the Fair Labor Standards, which is the minimum wage plus time and a half for any time over 40 hours per week. In this we are able to deduct any federal and state taxes in computing this gross dollar of $250,000; it can be deleted.

By Mr. Burgin:

We object, and move to strike that as immaterial, Your Honor, as to what's permitted in determining gross receipts under the Fair Labor Standards Act, as not being within the scope of the issues involved in this case.

By the Court:

It may not be, but the objection is overruled.

By Mr. Davis (Continuing):

Q. State whether or not the taxes you referred to, Mr. Gurley, are state and federal excise taxes on the sale of gasoline. A. That is what we are talking about.

Q. And it is your testimony, sir, that you are allowed to deduct these two taxes from the total gross receipts received by you in your operation which . . .

By Mr. Burgin:

We object for the additional reason as being repetitious.

[143] By the Court:

Let him answer it again. Objection overruled.

A. Yes, sir. This is the purpose of it.

By Mr. Davis (Continuing):

All right, sir.

* * *

[149] *Cross Examination*

* * *

By Mr. Burgin:

Q. Yes, sir. Now, Mr. Gurley, in your operation, as you indicated, you eliminate the wholesale distributor which exists in most gasoline operations, do you not, sir?

A. Yes, sir.

Q. You are both the wholesale distributor and the retailer in your instance? A. I am not a wholesaler; I am a retailer.

Q. You buy from the manufacturer and distribute to your individual retail locations, do you not, sir? A. No, sir.

Q. You do not? A. I put it into the retail location and sell it. There is no distribution between us.

Q. You don't distribute from where you purchase your source of supply? A. The same ownership at the source of supply is the same ownership at the retail outlet.

Q. I realize that, sir, but you do have to distribute it, do you not, sir? A. There is only a transportation; that is not [160] distribution.

Q. I see. All right, sir. Now you do have to post a bond as a wholesale distributor of gasoline with the Motor Vehicle Comptroller of the State of Mississippi, do you not? A. I post a bond in order to perform the requirements of paying the tax on the gasoline.

Q. Yes, sir, and if you did not post that bond, you would have to pay the state tax of 7¢ a gallon, the state privilege tax on wholesale distribution of gasoline, at the

time you imported that gasoline into the State of Mississippi, would you not, sir?

By Mr. Davis:

Your Honor, we object to the Senator's use of the word "privilege tax".

By the Court:

Well, describe what tax it actually is, Mr. Burgin. Rephrase the question.

By Mr. Davis:

The tax is described in the statute, as I understand it, Your Honor, as the Mississippi gasoline excise tax.

By Mr. Burgin:

Yes, sir, and it's also described in the statute as levied upon wholesale distributors for the privilege of doing business in the State of Mississippi, Your Honor.

By the Court:

But it's still an excise tax. Let's move along.

[161] By Mr. Burgin (Continuing):

Q. If you did not post that bond you would have to pay the tax on the gasoline as you brought it into the state, would you not, sir? A. I would have to pay it somewhere. Now whether it had to be before I brought it into the state would be something else. Probably not.

Q. As a matter of fact, the bond that you post with the Motor Vehicle Comptroller is conditioned upon your payment of the tax, of the excise tax levied, is it not, upon the wholesale distributor? A. It is a bond to assure the state that this tax will be subscribed and paid for.

Q. Yes, sir, and so far as payment of that tax is concerned, the State of Mississippi doesn't care whether you ever sell that gas to anybody else, do they sir; they expect their money on the 20th day of the following month, don't

they? A. I don't know that they expect it. It would be a little stupid of a person not to sell it and pay tax on something.

Q. I didn't ask you that, sir, but whether you sold the gas or not makes no difference to the state so far as your tax liability is concerned, does it, sir?

By Mr. Davis:

Your Honor, I object to that. Mr. Gurley has testified already that the state regulations allow him to take credit—If he does not sell gasoline, he does not [162] have to pay tax on that.

By Mr. Burgin:

I didn't understand his testimony that way, Your Honor.

By the Court:

Well, there could be an exception there. We will give Mr. Gurley a chance to explain it.

Do you have a copy of the bond, Senator Burgin?

By Mr. Burgin:

No, sir, but I can get one mighty quick.

By the Court:

Well, that's all right. Let's move along.

A. Would you restate your question?

By Mr. Burgin:

Would you read the question back, Mr. Reporter?

By the Reporter (Reading):

"Q. I didn't ask you that, sir, but whether you sold the gas or not makes no difference to the state so far as your tax liability is concerned, does it, sir?" A. Well, they are expecting to get their money.

By Mr. Burgin (Continuing):

Q. Yes, sir, whether you sold it to somebody to get the gas to an ultimate consumer or not, isn't that true, sir? A. Within the prescribed time, yes.

Q. Yes, sir. Now, Mr. Gurley, as I understood your testimony, you said that on the wholesale sales that you make, you bill the customer for 20¢ a gallon and then you [163] bill them for 4¢ federal tax and 7¢ state tax and 1¢ sales tax, is that correct? A. No, sir, I did not say that.

Q. You didn't say that? I misunderstood you, then. Would you tell us now how you do bill? A. The billing of product, which again we're talking about in a four and a half million dollar sale—you're talking about $10,000 worth of sales in this particular category, which is very, very small. This is an area that we're not even looking for business, we have done this as a courtesy to some people that have wanted some product, and when we bill this it is normally billed with everything included and just a total price is the total factor that we utilize as far as billing is concerned, and we're talking about transactions here within this whole scope of time of probably 15 to 18 transactions is all we're talking about, so this is not our normal business, this is not our normal procedure, and it's not something that we do with any kind of rapidity that we would really have a system of doing.

Q. All right, and I'll ask you, sir, is it not true that when you do make those wholesale sales, you add your 5% wholesale sales tax on the entire price, including the amount in the price for reimbursement of state and federal excise taxes? A. We have done this in, I believe, three occasions only, and that was right at the end, or at the beginning—at the end of '70 or the beginning of 1971—to one [164] account only . . .

Q. I see. A. . . . has this ever been done, and the total amount of tax involved in this would probably be

something—sales tax, I'm talking about—would probably be something over $100 is all we're talking about.

Q. All right, sir. I'll ask you, sir, if your normal invoices do not also say that the prices shown include state and federal taxes. A. Our normal invoices?

Q. Yes, sir. A. I'm going to be honest with you; I don't even recall whether that's on there or not. It may be.

Q. All right, sir. I hand you here a series of invoices to "Cummings Goco" and ask you to examine them. (Hands invoices to the witness). A. (Examining invoices). All right.

Q. Are those invoices in connection with the sale of your product? A. They are invoices pertaining to the wholesale product of lubricating oil.

Q. All right, sir, and . . .

By Mr. Davis:

Your Honor, we're going to object to any testimony as to these documents, since it has been stipulated that this suit does not deal with lubricating oil.

By the Court:

In what paragraph of your stipulation is that, [165] Mr. Davis?

By Mr. Davis:

I beg your pardon, Your Honor. The stipulation as such does not say that, but a reading of the stipulation will indicate that the total amount of taxes sought to be recovered here relates only to the federal and state excise tax on the sale of gasoline.

By the Court:

What paragraph is that in, Mr. Davis?

By Mr. Davis:

For example, in the first paragraph of the stipulation, the stipulation reads "That during the period from September 1, 1965, through August 31, 1971, Complainant and Cross-Defendant sold gasoline within the State of Mississippi . . ."

By the Court:

All right, sir. I see your paragraph. There's no point in your going on and reading it further.

By Mr. Davis:

There is no reference in here where we refer to the amount of money that we're seeking. It's pointed out therein that the tax we're talking about was upon the sale of gasoline.

By the Court:

Yes, sir. All right. The objection will be sustained.

[166] By Mr. Burgin (Continuing):

Q. Mr. Gurley, what is the retail price of your gasoline as shown on your pumps at your retail stations on regular? A. I couldn't tell you.

Q. Well, you know what it is approximately, don't you, sir? A. The price of gasoline changes. In all fairness—I mean, I'm not trying to evade your question, but I mean if I gave you an answer it could or could not be true. It might have been true yesterday but it may not be true this morning. Gasoline prices change tremendously.

Q. I realize that, sir, but is it not true that the pumps through which your gasoline is sold at retail show one gross purchase price per gallon? A. This is the only thing you have within your meter heads to set on there.

Q. Yes, sir. For instance, on regular the price would show perhaps 37.9¢, would it not? A. No, sir, we've never sold it that high.

Q. Well, 32.9¢? A. That is high, also; possibly 30.9. We might get that high.

Q. All right, and then your Ethyl would show one price again, would it not, say 32.9¢? A. Yes, sir.

Q. All right, sir, and the gross amount of your sale to any given customer would be that pump price times the [167] number of gallons that's pumped into his automobile, would it not? A. That would be the dollars and cents transaction.

Q. Yes, sir, and that is the gross proceeds of that sale to that customer, isn't it? A. That is the sale plus the tax plus the tax plus the tax, is the total.

Q. That's the way you interpret it, sir, . . . A. Yes.

Q. . . . but if I go up to your pumps today and I buy 10 gallons of Ethyl at 32.9¢, the purchase price as shown on that pump would be $3.29, would it not, and I would pay your operator $3.29, would I not, sir? A. You would pay that with—If you asked for an explanation, . . .

Q. I didn't—In other words, I'm buying gas, I'm not asking for an explanation. I want to run my car, . . . A. All right.

Q. . . . and your man—I'd say, "How much?" and your man would say "$3.29" and I'd pay him, and that would be it, wouldn't it? A. If that was what was showing on the pump, yes.

Q. Yes, sir, and that's the only price that's showing on any pumps, is the current price, the gross price at which you sell the product per gallon? A. No, sir, this is not the case.

Q. It's not? [168] A. No, sir. This is up in the meter head of the pump. That's all that you would ever see, but we do have decals, and have had them and a lot of times they will wear off before we replace them, but they also state as to the amount of federal and state tax that is involved in it.

Q. I see, but you don't put your price at 20¢ a gallon on the pump and then after the pump comes out add 4¢ federal tax and 7¢ state tax, do you? A. No, sir.

Q. Yes, sir. Now you said when you first started doing business back in '53 in Mississippi that you didn't include the state and federal excise tax in the computation of your sales tax. That was before the statute was amended to remove it from exemption from sales tax, wasn't it ? A. Well, I was able to exempt it at the time I started in business.

Q. Yes, sir, and then in 1956 the law was changed and you had to include it, or you were supposed to have? A. There was a change sometime in the fifties.

Q. Yes, sir.

(Whereupon a ten-minute recess was taken at this point).

By Mr. Burgin (Continuing):

Q. Mr. Gurley, you buy this gasoline from a source, we will say, in Arkansas? I believe that is where you said most of your product came from? [169] A. Arkansas and Tennessee.

Q. Yes, sir, and you have a permit, do you not, as a distributor issued by the Motor Vehicle Comptroller of the State of Mississippi? A. I don't know that it's called a permit. The compliance with the different phases or requirements of the law, to my knowledge, is the bond. Once subscribing to this, then this puts you into this category.

Q. You don't recall that simultaneously with posting the bond and its approval that you were issued a permit by the state? A. They may call it a permit and it may be a permit number, but I mean—and I'm just . . .

Q. You have to qualify with the Motor Vehicle Comptroller in order to bring this gas in and distribute it, don't you? A. Yes, sir.

Q. All right, sir, and that bond obligates you to pay the state tax on it, does it not, sir? A. Well, it obligates me to collect and to pass on to the state the tax.

Q. All right, sir. Now the state is looking to you and your bondsman for the payment of that tax, regardless, is it not, sir, on that gasoline? A. They are looking to me for the payment.

Q. Yes, sir. Now so far as the state is concerned, there is nothing in the world to keep you from paying 14¢ for the gas to your source, and paying the tax to the state, and selling it to your customers at 10¢ a gallon, is there? [170] A. No, sir, there's nothing in there to stop it.

Q. Nothing in the world to prevent you from doing that, is there? A. Not that I know of.

Q. All right, sir, and in effect what you do is pay the tax to the State of Mississippi as a gasoline distributor and then you pay that—you pass on as a matter of choice to your customers, the consumers, that cost which you have incurred, isn't it? A. If I sold it for 10¢ a gallon, I wouldn't be passing along that cost.

Q. No, sir, but when you sell regular for 30.9¢, for instance, you are passing on the tax that you had to pay on the gas to the ultimate consumer, are you not, sir? A. No, sir. I'm collecting the tax in order to pass the tax to the State of Mississippi.

Q. Oh, I see. All right, sir. By the same token, you pass on, at least indirectly, to your customers, do you not, sir, all the other costs that you incur in doing business? A. This is built in to your cost factor plus profit under normal conditions, yes.

Q. Yes sir. You pass on to the ultimate consumer the 14¢ a gallon, for instance, that is cost of the product, don't you? A. This is a part of the sale price, yes.

Q. Yes, sir, and you pass on to the ultimate consumer, your customer, your overhead, your cost of operating, of [171] transporting the gas to the point of retail distribution? That's built in to your total price, is it not, sir? A. That is in between the purchase price and the sale price.

Q. Yes, sir, and by the same token, the federal and state tax is also in between the purchase price and the sale price, is it not, sir? A. No, sir, not in my—That is a collection, and we are custodians for the federal and for the state for the tax.

Q. I see, but actually, sir, if the state is looking only to you for payment of the tax, what you do with the gasoline is immaterial, is it not? A. No, sir, I would not say that.

Q. I see. All of your costs of doing business in the normal situation, including your profit, goes to make up the 30.9¢, for example, don't they, sir?

By Mr. Davis:

Your Honor, he's asked him that question at least ten times, and I object to it as repetition.

By the Court:

It might be repetitous, Mr. Burgin.
Move along.

By Mr. Burgin (Continuing):

All right, sir. I have no further questions.

[172] *Redirect Examination*

By Mr. Davis:

Q. Mr. Gurley, you testified that you entered into agreements with the various grocery store operations, is that correct? A. Yes, sir.

Q. Now are these rural grocery store operations? A. Yes, sir. Primarily, yes, sir.

Q. I see. State whether or not, Mr. Gurley, the consignment agreement, which has been introduced as Exhibit D-1 to your testimony, contains a provision in paragraph IV that "Title to all products consigned and delivered to consignee hereunder shall at all times remain in consignor until they shall have been sold by consignee in accordance with the terms of this agreement." A. What was the question? I'm sorry.

Q. Is there such a provision in the contract which I have here, . . . A. Yes, sir.

Q. . . . which is Exhibit D-1 to your testimony? (Hands instrument to the witness).

A. (Examining instrument). Yes, sir.

Q. Is there such a provision in all of the contracts which you have with these various operators? A. Basically, yes.

Q. All right, sir. Now, Mr. Gurley, I'll ask you whether or not you actually pay 4¢ per gallon to these various operators? [173] A. There is no payment made. This is merely a bookkeeping procedure at the point, and it is deleted from the total price or the total amount of dollars and cents that was involved.

Q. So you don't treat this as a payment to an employee, do you? A. No, sir.

Q. Do you know whether or not these various operators actually receive in the end result 4¢ per gallon? A. No, sir.

By Mr. Davis (Continuing):

That's all, Your Honor.

By the Court:

Anything further, Mr. Burgin?

By Mr. Burgin:

Yes, sir. I have only one or two questions relative to that line of questioning.

By the Court:

All right.

Recross Examination

By Mr. Burgin:

Q. Mr. Gurley, is it not a fact that the commissions which you pay to your consignees appear on your books as an expense of sale and as a deduction from the gross sales price of gasoline made by those consignees? [174] A. In order to fulfill the bookkeeping of the gallons and the dollars and cents involved in this, they would have to use a computation from this.

Q. And your books, as a matter of fact, do show the gross sales price of the gasoline made by these consignees and show commissions as an expense of sale? A. We show that as a total in order to be able to keep books, is the purpose of that as far as the way it is shown.

By Mr. Burgin (Continuing):

That's all.

By the Court:

Q. Mr. Gurley, in reference to Bolden Grocery, Broadway Grocery, Thompson Grocery, and the Riley Grocery Store when it was in operation, did the gasoline pump at these grocery stores show principally the same figures for taxes, for price of gas, and so forth and so on, as the ones that you actually operated yourself as a retailer? A. As far as the total price is concerned, this price could have been different, and very probably was different.

Q. Who fixed that total price on the gasoline there? A. That was at our discretion, Your Honor.

Q. At your discretion? A. Yes, sir.

Q. In other words, you had the right to fix the price there just the same as you did on your pumps? A. Yes, sir.

[175] Q. And then the Boldens, the Broadways and the Thompsons had no right over the price of the gasoline at all, . . . A. No, sir, they did not.

Q. . . . as to what was shown on the pump? A. Yes, sir.

By the Court (Continuing):

All right, sir. You may be excused.

(Witness Excused).

By Mr. Davis:

That's all we have, Your Honor.
Complainant Rests.

[176] JOE SHARP

having been first duly sworn, was called as a witness on behalf of the Defendant, and testified as follows:

Direct Examination

By Mr. Burgin:

Q. Mr. Sharp, what official position, if any, do you hold with the State of Mississippi? A. I am the Motor Vehicle Comptroller for the State of Mississippi.

Q. In that capacity, what are your responsibilities with respect to the excise tax statutes on gasoline? A. I'm the administrator of those taxes.

Q. All right, sir. Mr. Sharp, I'll ask you what is required for a distributor or importer of gasoline, such as Mr. Gurley, to qualify with the state under the statutes? A. He must first apply for a permit from our Department to operate. He must also furnish a bond, ranging anywhere from $1,000 to $25,000.

Q. All right, sir. A. We will then issue the permit to him.

Q. Does that—What is the condition of that bond, sir? A. Conditioned upon the faithful payment to the State of Mississippi of the gasoline excise tax.

Q. All right, sir, and what is the permit issued, what does it authorize the man to do? A. It authorizes him to act as a distributor . . .

[177] By Mr. Davis:

Your Honor, we object. The permit will speak for itself. It would be the best evidence.

By the Court:

The objection will be sustained.

By Mr. Burgin (Continuing):

Q. All right, sir. Under the statute, can any person legally import gasoline into the State of Mississippi in absence of permit and bond? A. No, sir.

By Mr. Davis:

I object, Your Honor. This calls for a legal conclusion of the statutes.

By the Court:

Your objection will be sustained.

By Mr. Burgin:

Sir?

By the Court:

I sustained his objection, Senator Burgin. The statute would speak for itself.

By Mr. Burgin (Continuing):

Q. All right, sir. Mr. Sharp, to whom do you look for payment of the gasoline excise taxes? A. To the distributor.

Q. The distributor? A. Yes, sir.

Q. Does it make any difference, so far as the tax liability of the distributor whether—what the distributor [178] does with the gasoline that he imports into the State of Mississippi? A. Not so far as . . .

By Mr. Davis:

I object to that, Your Honor. That is a legal conclusion, as to what the tax liability of anybody would be.

By the Court:

I think you can rephrase that question, Mr. Burgin, and get it where it won't be objectionable.

By Mr. Burgin (Continuing):

All right, sir. I believe you testified, Mr. Sharp, that the state looks solely to the distributor for payment of the excise tax on gasoline? A. That's correct, sir.

Q. Does it make any difference, so far as the distributor's liability for payment of the tax, whether he has sold the gasoline or not? A. No, sir.

Q. Does it make any difference, so far as the distributor's tax liability is concerned, as to whether if he has sold the gasoline, he adds to his cost or purchase price the amount of the tax?

By Mr. Davis:

I object to the question, Your Honor, and I move to strike the answer to the previous question on the ground that again he is asking this witness to draw a legal conclusion here.

[179] By Mr. Burgin:

Your Honor, the complainant has sought to testify that he simply acts as a collecting agent from the ultimate consumer to the state.

By the Court:

I think Mr. Sharp can testify, Mr. Davis, as to the way his office is conducted and the provisions and the requirements.

Go ahead. Objection overruled.

By Mr. Burgin (Continuing):

Q. Would you like to have the question repeated? A. I would, yes, sir.

Q. Does it make any difference, so far as the distributor's liability to the state for payment of the excise tax on gasoline, whether the distributor has, in selling the gas, has passed the tax on to the ultimate consumer? A. No, sir.

Q. Can a person legally import gas into the State of Mississippi without obtaining a permit and posting the bond for payment of the tax? A. No, sir.

Q. In absence of a bond, Mr. Sharp, if I give your office notice that I intend to import a tankload of gasoline into the State of Mississippi, at what point would the excise tax become payable? A. At the moment you crossed the Mississippi state line.

[180] Q. And who would owe that tax at that time? A. The distributor.

Q. The distributor? A. Yes, sir.

Q. The man bringing it in? A. That's correct.

By Mr. Burgin (Continuing):

We have no further questions of this witness.

Cross Examination

By Mr. Davis:

Q. Mr. Sharp, you testified that you are charged with administering the excise tax on gasoline for the State of Mississippi, is that correct? A. Yes, sir.

Q. Now in such capacity, Mr. Sharp, isn't it true that you are concerned with receiving cash dollars into your office for the state; that's your major concern, isn't it? A. My major concern is collection of the gasoline excise taxes, yes.

Q. That's right. You only want to collect the tax; you don't care who the tax is imposed upon, do you? A. The tax is imposed upon the distributor and is so stated in the statute.

Q. That didn't answer my question. I didn't ask you that question. I asked you whether or not it was any concern of your office and your responsibility in [181] administering the Mississippi state gasoline excise tax as to who the tax is imposed upon. A. Very definitely. It is of concern to my Department.

Q. In what way is it a concern of your Department? A. Because of the statutes that we are required by law to administer. The statutes so state.

Q. The statute requires you to collect the tax, doesn't it? A. Yes, it does.

Q. It doesn't require you to determine who the tax is imposed upon, does it? A. It requires me to, shall we use the word "charge", an excise tax based upon a rate of gallons upon a distributor as a privilege for doing business.

Q. All right. It empowers you to charge a tax to the distributor, does it not, and collect it from him? A. That's correct.

Q. O.K. Now you testified, Mr. Sharp, that the tax is imposed at the moment that it crosses the state line? A. That's correct.

Q. Now that really isn't true, is it? A. Well, the statutes do provide that on the 20th of the month is the time for filing of the report, . . .

Q. All right. So . . . A. . . . provided a man has a permit.

Q. All right. So if Mr. Gurley has a permit, it is perfectly permissible for him to transmit that tax to you on the 20th day of the month following the month in which [182] the gallons came into the State of Mississippi? A. That's correct.

Q. All right. Mr. Sharp, does the statute which we refer to and which you administer contain refund provisions? A. It does.

Q. Describe to the Court briefly who those refunds are to and how they are made. A. Refunds are made—let's use 7¢ per gallon—refunds are made to users of gasoline at the rate of 6¢ per gallon for non-highway use.

Q. You say that the tax is refunded to the user? A. That's correct.

Q. How do you explain the fact, Mr. Sharp, that the tax is refunded to the user? Isn't that contradictory to your testimony that it is a tax on the distributor? A. I just do what the law says.

Q. All right. That's what I was trying to get you to say earlier.

By Mr. Carlisle:

We object to any comment.

By the Court:

The objection will be sustained.

By Mr. Davis (Continuing):

Q. Mr. Sharp, you don't actually know, do you, whether or not Mr. Gurley collects the tax from the ultimate consumer or not, do you? A. No, sir.

[183] Q. That's no concern of yours? A. That's correct.

Q. Your only concern is that you get the cash dollars into the state treasury, isn't that correct? A. That we get the dollars.

Q. That you get the dollars? A. Not necessarily cash.

Q. All right, sir. Now can a person be both a distributor and a retailer? A. In some cases.

Q. All right, sir, can a distributor, then, import gasoline into the State of Mississippi without giving notice to your office? A. He's not supposed to.

Q. All right, sir. You said that the same person could be both a distributor and a retailer. Can a person be a distributor and not be a retailer? A. Yes, sir.

Q. All right, sir. Mr. Sharp, state whether or not you, in administering your Act,—Strike that, Mr. Godwin. Describe to the Court what the requirements are with regard to gasoline that is stored within the State of Mississipi. A. The same requirement as in the case of anyone that imports; regardless of how it gets into the state, whether it's barge or pipeline or transport truck, the tax liability still attaches as it crosses the state line.

[184] Q. Are you testifying that the tax liability does not accrue at the time it's withdrawn from storage? A. No, sir. It does not on gasoline.

By Mr. Davis (Continuing):

All right, sir.
That's all we have.

Redirect Examination

By Mr. Burgin:

Q. Mr. Sharp, I hand you here a document and ask you if you can identify it. (Hands instrument to the witness). A. (Examining instrument). Yes, sir, I can.

Q. What is it, sir? A. It's Motor Vehicle Permit No. 447 for a distributor of gasoline, diesel fuel, kerosene or oil, to W. M. Gurley, doing business as GOCO, Gurley Oil Company.

Q. What is attached to that? A. Attached to it is an application to our Department for such a permit.

By Mr. Davis:

Your Honor, I'd like to have an opportunity to examine that.

By the Court:

All right. You will have that before he introduces it.

By Mr. Burgin:

I'll be glad to let him see it now, Your Honor. (Hands instrument to Mr. Davis, who examines it).

[185] By the Court:

All right, sir.

By Mr. Davis:

Your Honor, to expedite matters we are going to object to the introduction or any testimony with regard to these documents as not being proper rebuttal at this point. We did not go into any of these matters on cross examination.

By the Court:

Well, the objection will be overruled, Mr. Davis. This is not necessarily a rebuttal witness; it's further cross examination.

By Mr. Davis:

All right, sir.

Your Honor, we have some objections with regard to these documents. Evidently the Permit No. 447, Distributor of Gasoline, is not a complete copy of that document, it's not executed by anyone, and we would object on that ground, and we object to any testimony or introduction of this document here which is simply a form. It's not—It doesn't have anybody's name on it.

By Mr. Burgin:

Your Honor, I think we can connect that up. I was trying to save time.

By the Court:

All right. Let's see if you can connect it up, yes, sir.

[186] By Mr. Burgin (Continuing):

Q. Mr. Sharp, with reference to the instrument and application which you have identified, I'll ask you where the original of that permit is. A. It should be in Mr. Gurley's possession.

Q. Is this the file—a copy—a file copy maintained in the official records of your office? A. It is.

By Mr. Burgin (Continuing):

We offer the permit as a distributor of gasoline, diesel fuel, kerosene, oil, and the supporting application in evidence.

By Mr. Davis:

I object, Your Honor, on the grounds that the document is not, on its face, a true and correct copy of the permit.

By the Court:

Could I see it, please? (Examines instrument handed him by Counsel).

I think in order for your objection to be well taken you can be called upon to produce the original of this. The application is signed by "Mr. W. M. Gurley, Owner".

By Mr. Burgin:

Your Honor, at this point I move that the complainant and cross defendant be required to produce the original of the permit, in absence of which we be permitted to introduce the copy.

[187] By Mr. Davis:

Your Honor, we will make every effort to do that, if Mr. Gurley has it. I note that this document was dated in 1966.

By the Court:

Well now, Mr. Davis, to all intents and purposes Mr. Gurley is the only one that really needs to have a signed copy of that, isn't he, the permit signed by the Motor Vehicle Comptroller's office?

By Mr. Davis:

Yes, sir, I would think so.

By the Court:

Very well. Let it be admitted. The objection will be overruled.

(Whereupon Permit No. 447 was marked by the Reporter as EXHIBIT D-2 to the testimony of the witness Sharp, was received in evidence, and is attached hereto):

STATE OF MISSISSIPPI
MOTOR VEHICLE COMPTROLLER
JACKSON, MISSISSIPPI

PERMIT No. 447

DISTRIBUTOR OF GASOLINE, DIESEL FUEL, KEROSENE OR OIL

KNOW ALL MEN BY THESE PRESENTS:

W. M. Gurley d/b/a GOCO (Gurley Oil Co.)
P. O. Box 2326
Memphis, Tennessee

has been granted the right to engage in the business of Distributor of Gasoline, Diesel Fuel, Kerosene or Oil within the State of Mississippi, subject to the terms and conditions of Chapter 264, Laws of 1946 as amended.

Given under my hand and seal of office this the 7 day of October, 1966.

.....
Motor Vehicle Comptroller

[183] EXHIBIT D-2—Witness, Sharp

STATE OF MISSISSIPPI—MOTOR VEHICLE COMPTROLLER

APPLICATION FOR PERMIT AS DISTRIBUTOR OF GASOLINE, DIESEL FUEL, KEROSENE OR OIL

Record of Revocation

Permit No. .....
Type of Bond G & O
Bond Required $16,000.00

To the MOTOR VEHICLE COMPTROLLER

State of Mississippi
Jackson, Mississippi Date August 29, 1966

Application for a permit is hereby made by the undersigned to engage in the business of Distributor of Gasoline, Diesel Fuel, Kerosene or Oil in the State of Mississippi:

NAME OF BUSINESS: W. M. Gurley d/b/a GOCO (Gurley Oil Company)

ADDRESS P. O. Box 2326, Memphis, Tennessee

Individual, Partnership or Corporation: Individual

Full name and address of owner if individual W. M. Gurley, P. O. Box 2326, Memphis, Tenn.

Names and addresses of partners, if partnership .....

.....

Names and addresses of officers, if a corporation .....

.....

Incorporated under Laws of State of .....

Capital Stock $.....

Principal place of business in Mississippi Olive Branch, Mississippi

Other places of business in Mississippi .....

Nesbit
Potts Camp
Byhalia

Approximate gallonage of Gasoline, Diesel Fuel and Kerosene to be received or sold in the most active month of the year ..... Approximate gallonage of oil (as defined in statute) to be received or sold in the most active month of the year .....

Total gallonage handled during preceding calendar year .....

Gasoline .....
Diesel Fuel .....
Kerosene .....
Oil .....

Have you heretofore given bond as a distributor in Mississippi? ..... If so name of bonding company .....
Amount of Bond $16,000.00 Date .....

SIGNATURES OF PERSONS APPEARING IMMEDIATELY BELOW ARE HEREBY AUTHORIZED TO SIGN AS AGENTS:

....

(Actual Signature of Agent) (Actual Signature of Agent)

.....

(Actual Signature of Agent)

Name of Individual, Partnership or Corporation Gurley Oil Company

By /s/ W. M. Gurley (Title) Owner

[189] By Mr. Burgin (Continuing):

Q. Mr. Sharp, I hand you another document and ask you if you can tell me what that is, sir. (Hands instrument to the witness). A. (Examining instrument). It is a permit to operate as a distributor of crankcase lubricating oils.

Q. Is that a copy of an original that was issued by your office to Gurley Oil Company? A. It is.

Q. And what is the document attached to it? A. It is an application.

Q. By whom is it signed? A. "W. M. Gurley, Gurley Oil Company."

By Mr. Burgin (Continuing):

All right, sir.

We offer this permit in evidence as an exhibit to the testimony of Mr. Sharp.

By Mr. Davis:

I object, Your Honor. Lubricating oil is not involved.

By the Court:

It's not in issue, as the Court understands it, Mr. Burgin, so the objection will be sustained.

By Mr. Burgin (Continuing):

All right, sir. Good.

Q. In connection with the permit to act as a distributor of gasoline, diesel fuel, kerosene, which has been introduced, did Mr. Gurley post a bond? [190] A. He did, sir.

Q. Can you tell me the amount of that bond? A. $16,000.00.

Q. Mr. Sharp, does your office have a standard bond form which is executed in connection—before permits of this nature are issued? A. Yes, we do. However, I will say this: I am not sure, because I was not in office in 1966, that the same form was then used.

Q. I see. Where are the original of those bonds kept? A. As required by law, with the Treasurer of the State of Mississippi.

Q. All right, sir, and is Mr. Gurley's bond filed there? A. Yes, it is, sir.

By Mr. Burgin (Continuing):

All right, sir.

Your Honor, at this time I'd like to ask leave of the Court for permission to issue a subpoena returnable instanter for the Treasurer to produce the bond of Mr. Gurley, with the understanding that when it is produced we will ask for consent to withdraw the original and . . .

By the Court:

Hasn't Mr. Gurley pled and stated from the witness stand that he did execute such a bond?

By Mr. Burgin:

Yes, sir.

[191] By the Court:

I don't think the bond is in dispute at all.

By Mr. Burgin:

No, sir, but we think that it might be material for the Court to have before it the unconditional covenants of the bond to absolutely pay all tax liability for gasoline imported into the State of Mississippi.

By the Court:

Well, isn't that bond based on the requirements of the statute?

By Mr. Burgin:

It is, sir.

I'll withdraw the request.

By the Court:

All right, sir.

By Mr. Burgin (Continuing):

No further questions.

By the Court:

Any further questions, Mr. Davis?

By Mr. Davis:

We have no further questions.

By the Court:

All right. You may stand aside.

(Witness Excused).

[192] By Mr. Burgin:

It is stipulated and agreed by and between Counsel for both complainant and defendant that Cause No. 81,953 on the docket of this Court and Cause No. 82-374 on the docket of this Court be, and the same are hereby, consolidated for trial and ultimate decision by the Court, by agreement.

By the Court:

Is that satisfactory, Mr. Davis?

By Mr. Davis:

Yes, sir. We will so stipulate.

By the Court:

All right.

(Ten-minute recess taken at this point.)

By Mr. Burgin:

Your Honor, the defendant and cross complainant rests.

Defendant Rests.

By the Court:

All right, sir. Anything further, Mr. Davis?

By Mr. Davis:

Nothing further, Your Honor.
Both Sides Rest.

[193] By the Court:

If you gentlemen have no objection, the Court would like for you to submit briefs and authorities, and a general discussion.

The Court is frankly of the opinion that there is a whole lot more involved in a decision in this suit than this one particular case, and it is very important.

By Mr. Burgin:

Your Honor, the Court may rest assured of that.

(Off-the-record discussion followed at this point regarding time for filing briefs).

(This was all of the proceedings and testimony taken at the time and place indicated in the caption hereto).

[194] REPORTER'S CERTIFICATE

STATE OF MISSISSIPPI
COUNTY OF HINDS.

I, R. M. Godwin, Official Court Reporter for the Fifth Chancery Court District of Mississippi, certify that to the best of my skill and ability I reported the proceedings had and done upon the trial in the cause of W. M. GURLEY, d/b/a GURLEY OIL COMPANY, Complainant, vs. ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI, Defendant, No. 81-953 on the docket of the Chancery Court of the First Judicial District of Hinds County, Mississippi

COMBINED FOR TRIAL PURPOSES

with the cause of W. M. GURLEY, d/b/a GURLEY OIL COMPANY, Complainant, vs. ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI, Defendant, No. 82-374 on the docket of the Chancery Court of the First Judicial District of Hinds County, Mississippi, on January 21, 1972, and that the foregoing seventy (70) pages contain a full, true and correct transcript of my stenographic notes taken on said trial.

This, the 2nd day of February, 1972.

/s/ R. M. Godwin
Official Court Reporter

REFERENCE TO OPINION AND FINAL DECREE OF CHANCERY COURT

The Opinion of the Chancery Court of the First Judicial District of Hinds County, Mississippi, filed July 14, 1972, has been reproduced as Appendix B, pages 32-39, to the Petition for Writ of Certiorari.

The Final Decree and Judgment of the Chancery Court of the First Judicial District of Hinds County, Mississippi, filed July 28, 1972, has been reproduced as Appendix B, pages 40-42, to the Petition for Writ of Certiorari.

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

NOTICE TO COURT REPORTER TO TRANSCRIBE NOTES AND APPELLANT'S DESIGNATION OF RECORD

(Filed August 1, 1972)

TO: MISS KAY FERGUSON
Official Court Reporter
Fifth Chancery Court District
1201 Poplar Boulevard
Jackson, Mississippi

Dear Miss Ferguson:

W. M. GURLEY, d/b/a GURLEY OIL COMPANY, Complainant in the above styled and numbered cause, feeling aggrieved on account of the Final Decree and Judgment entered in this cause on July 28, 1972, dismissing the Bills of Complainant and Amendments thereto filed by the Complainant granting the relief sought by Cross-Complainant, Arny Rhoden, in the amount of $29,-131.19, together with statutory interest, and dissolving the injunction issued in Cause No. 82,374, hereby notifies you that he desires that you transcribe and file your stenographic notes of the trial and proceedings in the above styled and numbered causes for purposes of appeal.

Pursuant to and in accordance with the statutes of the State of Mississippi in such cases made and provided, W. M. Gurley hereby designates the following to be included in the record of this case for purposes of appeal to the Supreme Court of the State of Mississippi:

1. A copy of all pleadings and amendments thereto filed by the parties herein in both Cause No. 81,953 and Cause No. 82,374.
2. A copy of the Stipulation stipulated and agreed by and between counsel for the Complainant and Cross-Defendant, W. M. Gurley, and the Defendant and Cross-Complainant, Arny Rhoden, dated January 20, 1972.
3. A copy of all proceedings conducted by and before the Court prior to the taking of testimony in these causes.
4. A copy of all testimony of all witnesses who testified at the trial of these causes.
5. All exhibits and testimony introduced in evidence in the trial of these causes.
6. All documentary evidence introduced in the trial of these causes.
7. A copy of all motions, objections, rulings of the Court and other proceedings made in the course of the trial of these causes.
8. A copy of all Orders and Decrees of the Court entered in these causes.
9. A copy of the Final Decree and Judgment rendered and entered in these causes.
10. A copy of this Notice.

It is our intention by this designation to have the record of appeal include all of the record, proceedings, testimony, evidence and pleadings in this cause, excepting only the process, which may be omitted.

I would appreciate your acknowledging receipt of this Notice by signing the enclosed copy and returning to me in the self-addressed envelope.

Sincerely yours,

Thomas, Price, Alston, Jones & Davis

By /s/ Charles R. Davis

One of the Attorneys for W. M. Gurley

(Certificates of Service Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

APPEAL BOND

(Filed October 20, 1972)

STATE OF MISSISSIPPI)
)
COUNTY OF HINDS)

KNOW ALL MEN BY THESE PRESENTS:

W. M. GURLEY, d/b/a GURLEY OIL COMPANY, a sole proprietorship, located in West Memphis, Arkansas, but authorized to do business in the State of Mississippi, Principal, and THE TRAVELERS INDEMNITY COMPANY, Surety, duly authorized to do business in the State of Mississippi, are all held and are firmly bound unto Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi, in the penal sum of Five Hundred and no/100 Dollars ($500.00), for which payment well and truly to be made, jointly and severally, bind ourselves, our successors and assigns forever.

The condition of the foregoing obligation is such that whereas, on July 28, 1972, the Chancery Court of the First Judicial District of Hinds County, Mississippi, rendered a Final Decree and Judgment in these causes, and the said W. M. Gurley, d/b/a Gurley Oil Company, being aggrieved by said Final Decree and Judgment, has asked and obtained an appeal to the Supreme Court of Mississippi without supersedeas.

Now, if the said W. M. Gurley, d/b/a Gurley Oil Company, shall prosecute this appeal with effect and shall pay all costs, including costs of the transcript, if the same be affirmed, then this obligation to be void; otherwise, to remain in full force and effect.

WITNESS OUR SIGNATURES, this the 18th day of October, 1972.

W. M. Gurley, d/b/a Gurley Oil Company
Principal

By /s/ Charles R. Davis
His Attorney

The Travelers Indemnity Company
Surety

By /s/ Thetis Meagher
Attorney-in-Fact and Resident Mississippi Agent

APPROVAL OF APPEAL BOND

The foregoing Appeal Bond approved this the 20th day of October, 1972.

/s/ Tom Virden
Chancery Clerk of Hinds County

By /s/ Jean Holmes D. C.

(Power of Attorney of Surety Omitted in Printing)

REFERENCE TO OPINION OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI

The Opinion of the Supreme Court of the State of Mississippi, filed January 28, 1974, has been reproduced as Appendix A, pages 21-31, to the Petition for Writ of Certiorari.

MANDATE OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI

(April 25, 1974)

STATE OF MISSISSIPPI

To the Honorable the Chancery Court of Hinds County —Greetings:

WHEREAS, on the 28th day of January, 1974 (the same being a day of the regular term of our SUPREME COURT, begun and held in the Court room, in the Capitol, in the City of Jackson, in said State, on the 2nd Monday of September, in the year of our Lord, 1973, the following final Decree was rendered by our SUPREME COURT, to-wit:

No. 47,371

W. M. GURLEY D/B/A GURLEY OIL COMPANY

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of the First Judicial District of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 28th day of July, 1972-be and the same is hereby affirmed. It is further ordered and adjudged and decreed that the

appellee do have and recover of and from the appellant the sum of $1,456.56 being damages at the rate of 5 per centum as allowed by statute and from the appellant and The Travelers Indemnity Company, surety on the appeal bond herein, all of the costs of this appeal to be taxed for which let proper process issue.

YOU ARE THEREFORE HEREBY COMMANDED, That such execution and further proceedings be had in said cause, as according to right and justice, and the judgement of our SUPREME COURT and the law of the land ought to be had.

WITNESS, the Hon. Robert G. Gillespie Chief Justice of our Supreme Court; also the signature of the Clerk and the Seal of said Court hereunto affixed, at office, at Jackson, this the 25th day of April, A. D., 1974.

/s/ Julia H. Kendrick, Clerk

By ....., D. C.